No. 13-___

IN THE

Supreme Court of the United States

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari
to the California Court of Appeal, Fourth District

PETITION FOR A WRIT OF CERTIORARI

Patrick Morgan Ford
ATTORNEY AT LAW
1901 First Avenue
Suite 400
San Diego, CA 92101

Kevin K. Russell
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20036

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

QUESTION PRESENTED

Whether or under what circumstances the Fourth Amendment permits police officers to conduct a warrantless search of the digital contents of an individual's cell phone seized from the person at the time of arrest.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Leon Riley respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth District, Division One, in Case No. D059840.

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. 1a) is unpublished but can be found at 2013 WL 475242. The order of the California Supreme Court denying review (Pet. App. 24a) is unpublished. The relevant trial court proceedings and order are unpublished.

JURISDICTION

The California Supreme Court denied review on May 1, 2013. Pet. App. 24a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(A).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."

STATEMENT OF THE CASE

1. Early in the morning on August 22, 2009, the police pulled over petitioner David Riley, a local college student, who was driving his Lexus near his home in San Diego. The officer who initiated the stop, Charles Dunnigan, told petitioner that he had pulled him over for having expired tags. Pet. App. 3a, 5a. Officer Dunnigan soon learned that petitioner

was driving with a suspended license and thus decided to impound petitioner's car.

At the inception of an impound, San Diego Police Department policy requires officers to conduct an inventory search of the vehicle in order to document its contents. Pet. App. 5a. Officer Dunnigan called in another officer to assist with this task. Tr. 112. During the inventory search, the officers discovered two firearms under the car's hood. Pet. App. 3a, 6a. Based on this discovery, Officer Dunnigan placed petitioner under arrest for carrying concealed and loaded weapons. Pet. App. 6a.

During the arrest, Officer Dunnigan seized petitioner's cell phone from his person. Pet. App. 15a.[1] The phone was a Samsung Instinct M800 "smartphone" – a touch-screen device designed to compete with Apple's iPhone, capable of accessing the internet, capturing photos and videos, and storing both voice and text messages, among other functions. *Samsung Instinct Touchscreen Cell Phone: Features*, Samsung, http://www.samsung.com/us/mobile/cell-phones/SPH-M800ZKASPR-features (last visited July 28, 2013).

Upon seizing petitioner's phone, officers performed two separate, warrantless searches of its

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[1] Some testimony presented at trial suggested that petitioner's phone might have been sitting on the seat of his car instead of on his person at the time of arrest. Pet. App. 15a. But the trial court found that "the cell phone . . . was on [Riley's] person at the time of the arrest," and the California Court of Appeal treated that finding as binding for purposes of appeal. *Id.* Accordingly, petitioner proceeds here on the basis of that finding as well.

digital contents. First, Officer Dunnigan scrolled through the phone's contents at the scene. He noticed that some words (apparently in text messages and the phone's contacts list) normally beginning with the letter "K" were preceded by the letter "C." Pet. App. 6a; Tr. at 114-15. Officer Dunnigan believed that the "CK" prefix referred to "Crip Killers," a slang term for members of a criminal gang known as the "Bloods." Tr. at 114-15.

The second search of petitioner's phone took place hours later at the police station. After conducting an interrogation in which petitioner was nonresponsive, Detective Duane Malinowski, a detective specializing in gang investigations, went through petitioner's cell phone. The detective searched through "a lot of stuff" on the phone "looking for evidence." Tr. 176, 193. Detective Malinowski found several photographs and videos that suggested petitioner was a member of a gang. Pet. App. 4a, 6a-7a. He also found a photo of petitioner with another person posing in front of a red Oldsmobile that the police suspected had been involved in a prior shooting.

In the shooting incident, three individuals had reportedly fired several shots at a passing car before fleeing in a red Oldsmobile. The police believed the shooting was gang related. After finding the photos on petitioner's phone indicating that he owned a red Oldsmobile and that he was connected to gang activity, and after ballistics testing suggested that the firearms seized during petitioner's traffic stop were used in the shooting incident, law enforcement came to believe that petitioner had been involved in that incident.

2. The State ultimately charged petitioner and two others with shooting at an occupied vehicle, attempted murder, and assault with a semiautomatic firearm.[2] The State also alleged that petitioner committed these crimes for the benefit of a criminal street gang – an allegation that not only rendered evidence of petitioner's alleged membership in a nefarious street gang admissible (and, indeed, highly relevant) at trial but also exposed him under California law to significantly enhanced sentences. The two co-defendants eventually pleaded guilty to involvement in the crime, but petitioner insisted on his innocence.

Prior to trial, petitioner moved to suppress all of the evidence the police had obtained during the searches of his cell phone. Tr. at 269-70. As is pertinent here, petitioner argued that the search of his cell phone violated the Fourth Amendment because it was performed without a warrant and without any exigency otherwise justifying the search. Tr. at 269-70. The trial judge rejected this argument, ruling that the searches were legitimate searches incident to arrest. Pet. App. 7a-8a.

The trial ended in a hung jury, but the State elected to retry petitioner. During the second trial (as at the first), none of the State's four eyewitnesses could identify petitioner as one of the shooters. The

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[2] The State separately charged petitioner in conjunction with the traffic stop with carrying a concealed firearm in a vehicle, carrying a loaded firearm, and receiving stolen property. Petitioner pleaded guilty to all three charges and was sentenced to four years in prison. Those convictions are not at issue here.

State, therefore, relied on circumstantial evidence to connect petitioner to the crime. Among other things, the State showed the jury the photo of petitioner posing in front of the Oldsmobile with one of the co-defendants. In addition, the State presented videos from petitioner's cell phone showing street boxing fights involving both co-defendants, in which petitioner could be heard in the background encouraging the co-defendants and shouting gang-related comments.

The jury convicted petitioner on all three charges. Pursuant to California law, the trial court stayed petitioner's sentences on the two convictions carrying lesser sentences, activating petitioner's sentence only on the conviction that carried the longest sentence, in this case shooting at an occupied vehicle. Without the gang enhancement, this crime is punishable by a maximum of seven years in prison. Cal. Penal Code § 246. With the gang enhancement, however, petitioner's conviction for shooting at an occupied vehicle required the court to sentence him to fifteen years to life in prison. Pet. App. 1a; *see also* Cal. Penal Code § 186.22(b)(4)(B).

3. While petitioner's case was proceeding to trial, the California Supreme Court decided *People v. Diaz*, 244 P.3d 501 (Cal. 2011). In that decision, which is reproduced at Pet. App. 25a-65a, the California Supreme Court held by a 5-2 vote that the Fourth Amendment's search-incident-to-arrest doctrine permits the police to search a cell phone (even some time later at the stationhouse) whenever the phone is "immediately associated with [the arrestee's] person" at the time of the arrest. Pet. App. 33a-34a. The majority acknowledged that its holding deepened a

conflict on the issue among federal courts of appeals and state supreme courts. *Id.* 47a n.17. But the majority maintained that only this Court has the power to distinguish searching the digital contents of a cell phone from this Court's prior decisions allowing police officers to search the physical contents of ordinary containers incident to arrest. *Id.* 47a.

Mr. Diaz filed a petition for a writ of certiorari. Shortly thereafter, the California Legislature passed a bill requiring the police to obtain a search warrant before searching the contents of any "'portable electronic devices,' including cellular telephones." Supplemental Br. in Opp. 1, *Diaz v. California*, 132 S. Ct. 94 (2011) (No. 10-1231), 2011 WL 4366007, at *1 (describing Senate Bill 914 (2011)). After the State brought this bill to this Court's attention, *see id.*, the Court, at the State's urging, denied review. 132 S. Ct. 94 (2011). One week later, California Governor Jerry Brown vetoed the state legislature's bill, stating that the "courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizures protections." Letter from Edmund G. Brown Jr., Governor, to Members of the California State Senate (Oct. 10, 2011), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_vt_20111009.html.

4. The California Court of Appeal affirmed petitioner's convictions. As is relevant here, the court held that "*Diaz* controls the present case" because the cell phone was "immediately associated with [petitioner's] person" at the time of his arrest. Pet. App. 15a.

5. Petitioner sought discretionary review in the California Supreme Court. As is pertinent here, he

renewed his argument that the warrantless searches of his cell phone violated the Fourth Amendment. Pet. for Review at 13-20. The California Supreme Court denied review without comment. Pet. App. 24a.

REASONS FOR GRANTING THE WRIT

Federal courts of appeals and state courts of last resort are openly and intractably divided over whether the Fourth Amendment permits the police to search the digital contents of an arrestee's cell phone incident to arrest. This issue is manifestly significant. It also has had more than sufficient time to percolate. This Court should use this case – which presents the issue in the context of a modern "smartphone" and a particularly comprehensive fact pattern – to resolve the conflict and to hold that the Fourth Amendment prohibits such searches without a warrant.

I. Federal And State Courts Are Openly Divided Over Whether The Fourth Amendment Permits Police Officers To Search The Digital Contents Of An Arrestee's Cell Phone Incident To Arrest.

A. Background

The conflict over whether the Fourth Amendment permits police officers to search the digital contents of cell phones incident to arrest arises from (1) seemingly divergent threads in this Court's precedent and (2) disagreement over the import of qualitative differences between cell phones and traditional physical containers that might be seized incident to arrest.

1. The modern framework for analyzing the search-incident-to-arrest exception to the warrant requirement emanates from *Chimel v. California*, 395 U.S. 752 (1969). In that case, this Court explained that, in order to "seize weapons and to prevent the destruction of evidence," the Fourth Amendment permits police officers to search "the arrestee's person" and "the area into which an arrestee might reach" while being arrested. *Id.* at 763-64 (internal quotation marks and citation omitted).

This Court elaborated on the search-incident-to-arrest doctrine in *United States v. Robinson*, 414 U.S. 218 (1973). There, this Court upheld an officer's search of a crumpled cigarette package found on the defendant's person during his arrest. Rejecting the argument that the search was unlawful because the package was unlikely to contain any weapon or evidence related to the crime of arrest, this Court reasoned that searches incident to arrest do not depend on "the probability in a particular arrest situation that weapons or evidence would in fact be found." *Id.* at 235. This Court also stated – perhaps even more categorically – that "[i]t is the fact of the lawful arrest which establishes the authority to search." *Id.*

At the same time, this Court has indicated that a lawful arrest does not always allow the police to search items they seize during that arrest. In *United States v. Chadwick*, 433 U.S. 1 (1977), this Court held that the Fourth Amendment did not allow officers to search a locked footlocker they had seized from a person while arresting him. This Court reasoned that once the officers had "exclusive control" over the footlocker, "there [was] no longer any danger

that the arrestee might gain access to the property to seize a weapon or destroy evidence." *Id.* at 15. More recently, this Court held that the search of an arrestee's vehicle incident to arrest violates the Fourth Amendment when the arrestee is handcuffed in the patrol car at the time of the search. *Arizona v. Gant*, 556 U.S. 332 (2009). Applying *Chimel*, this Court explained that where "there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.* at 339.

2. Courts across the country are now "struggl[ing] to apply [this] Court's search-incident-to-arrest jurisprudence" – a set of legal rules largely developed decades ago, before the digital era – to the question whether the Fourth Amendment permits warrantless "search[es] of data on a cell phone seized from the person." *United States v. Wurie*, ___ F.3d ___, 2013 WL 2129119, at *4 (1st Cir. May 17, 2013).

Modern cell phones provide ready access to a vast array of personal data, and are distinct from the types of possessions – such as cigarette packages and footlockers – this Court has previously considered. For one thing, while physical containers face obvious space-related constraints, cell phones are capable of storing a virtually limitless amount of information in a single, compact device. Accordingly, individuals can carry exponentially larger quantities of personal information on their person than they ever could prior to the advent of cell phones.

Additionally, cell phones are capable of storing, recording, and accessing private information in a

variety of forms. Typical "smartphones" contain, for example, a digital rolodex of contacts, several months or even years of past text and email correspondence, and detailed appointment calendars. Indeed, "[e]ven the dumbest of modern cell phones gives the user access to large stores of information. For example, the 'TracFone Prepaid Cell Phone,' sold by Walgreens for $14.99, includes a camera, MMS (multimedia messaging service) picture messaging for sending and receiving photos, video, etc., mobile web access, text messaging, voicemail, call waiting, a voice recorder, and a phonebook that can hold 1000 entries." *United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012).

Beyond the advanced capabilities of the phones themselves, modern cell phones incorporate computers that allow individuals to access the internet, presenting additional privacy concerns. Thus, a search incident to arrest could, at the touch of a button, become a search of private and confidential information such as medical records, banking activity, and work-related emails. *See Smallwood v. State*, 113 So. 3d 724, 729 (Fla. 2013).[3] The contents of a person's cell phone can also contain intimate details and video of people's private lives, potentially exposing them to extreme embarrassment or worse. *See, e.g.*, *Newhard v. Borders*, 649 F. Supp.

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[3] *See also* Maeve Duggan & Lee Rainie, Pew Research Ctr.'s Internet & Am. Life Project, Cell Phone Activities 2012, at 2 (2012), *available at* http://pewinternet.org/~/media//Files/Reports/2012/PIP_CellActivities_11.25.pdf (noting that 29% of cell phone owners use their phones for online banking, and 31% access medical information).

2d 440, 443-44 (W.D. Va. 2009) (noting that after the police arrested a school teacher for a DUI, they searched his cell phone and found sexually explicit photos of him and his girlfriend and then shared the photos with other officers and members of the public).

B. The Conflict

The struggle to apply this Court's precedent to the unique technological capabilities of cell phones has divided federal courts of appeals and state courts of last resort over whether police officers may search the digital contents of a cell phone incident to arrest. At least six courts hold that the Fourth Amendment permits such searches, while at least three others hold that it does not.

1. Three federal courts of appeals and three state courts of last resort have concluded that the Fourth Amendment permits police officers to search all or at least some of the digital contents of a cell phone incident to arrest. Three courts, including the California Supreme Court, rely on *Robinson* to hold that such searches are categorically permitted, reasoning "there is no legal basis" for distinguishing the digital contents of a cell phone from any other item that the police may discover and seize from a person incident to arrest. *People v. Diaz*, 244 P.3d 501, 510 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011) (reproduced at Pet. App. 43a); *United States v. Murphy*, 552 F.3d 405, 411-12 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2016 (2009); *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007), *cert. denied*, 549 U.S. 1353 (2007). Accordingly, these

courts hold that police officers may always search any digital contents within a cell phone without seeking a warrant.[4]

Three other courts have held that police may search certain digital files within cell phones incident to arrest, without opining whether every type of file is open to such inspection. *United States v. Flores-Lopez*, 670 F.3d 803, 809-10 (7th Cir. 2012) (search to obtain the cell phone's number); *Commonwealth v. Phifer*, 979 N.E.2d 210, 216 (Mass. 2012) (search of recent call list); *Hawkins v. State*, 723 S.E.2d 924, 926 (Ga. 2012) (search to obtain text messages that was limited "'as much as is reasonably practicable by the object of the search'") (internal quotation marks and citation omitted).

2. In direct contrast, one federal court of appeals and at least two state courts of last resort have held that the Fourth Amendment forbids police officers from searching any digital contents of a cell phone incident to an arrest without a warrant. *See United States v. Wurie*, ___ F.3d ___, 2013 WL 2129119, at *11 (1st Cir. May 17, 2013); *Smallwood v. State*, 113 So. 3d 724, 735-36 (Fla. 2013); *State v. Smith*, 920 N.E.2d 949, 956 (Ohio 2009), *cert. denied*, 131 S. Ct.

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[4] The Tenth Circuit, in an unpublished opinion, has also endorsed the categorical proposition that "the permissible scope of a search incident to arrest includes the contents of a cell phone found on the arrestee's person." *Silvan W. v. Briggs*, 309 Fed. App'x 216, 225 (10th Cir. 2009). Furthermore, the Supreme Court of Connecticut has allowed cell phone searches in the context of the automobile exception, using reasoning that appears to apply with equal force in the search-incident-to-arrest context. *See State v. Boyd*, 992 A.2d 1071, 1089 & n.17 (Conn. 2010), *cert. denied*, 131 S. Ct. 1474 (2011).

102 (2010).[5] Two of these three decisions (*Wurie* and *Smallwood*) post-date this Court's earlier denials of certiorari on this issue and thus cement the conflict.

In the view of these courts, it "defies logic and common sense in this digital and technological age" to equate the contents of a cell phone with the kinds of physical objects at issue in *Robinson* and other cases, *Smallwood*, 113 So. 3d at 733, for cell phones are capable of storing information "wholly unlike any physical object found within a closed container." *Smith*, 920 N.E.2d at 954. Furthermore, these courts note that "[a] search of [a] cell phone's contents [is] not necessary to ensure officer safety" or to safeguard any evidence from "imminent destruction." *Id.* at 955. Consequently, these courts rely on *Chadwick* and *Gant* to hold that "warrantless cell phone data searches are *categorically* unlawful under the search-incident-to-arrest exception." *Wurie*, 2013 WL 2129119, at *10.

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[5] While declining to base its holding on "whether there was a search incident to arrest," the Wisconsin Supreme Court also has held that police officers may not, absent exigent circumstances, conduct a warrantless search of images stored on a cell phone seized from a person they have detained and handcuffed. *State v. Carroll*, 778 N.W.2d 1, 12 & n.7 (Wis. 2010).

II. The Propriety Of Cell Phone Searches Incident To Arrest Should Be Resolved Now.

A. The Issue Greatly Affects Personal Privacy And Day-To-Day Police Operations.

1. "It is the rare arrestee today who is not found in possession of a cell phone."[6] The vast majority of American adults – approximately 91% as of June 2013 – now own a cell phone. Of those cell phone owners, 61% own smartphones, such as Apple's iPhone and the Samsung device at issue here.[7]

At the same time, police in the United States arrest thousands of people every day. In 2010 alone, there were nearly 11.5 million total adult arrests.[8] These arrests are often triggered by legal infractions as minor as failure to abide by the vehicle code. *Cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 354-55 (2001) (upholding the constitutionality of the arrest of a motorist for failure to fasten her seat belt). Thus,

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[6] M. Wesley Clark, *Searching Cell Phones Seized Incident to Arrest*, FBI L. Enforcement Bull., Feb. 2009, at 25, *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2009-pdfs/february09leb.pdf.

[7] *See* Aaron Smith, Pew Research Ctr.'s Internet & Am. Life Project, Smartphone Ownership – 2013 Update 2, *available at* http://www.pewinternet.org/Reports/2013/Smartphone-Ownership-2013.aspx.

[8] Howard N. Snyder, Bureau of Justice Statistics, U.S. Dep't of Justice, Patterns and Trends: Arrest in the United States, 1990-2010, at 2 tbl.1 (2012), *available at* http://www.bjs.gov/content/pub/pdf/aus9010.pdf.

even routine arrests for minor offenses regularly give rise to the question presented. *See People v. Nottoli*, 130 Cal. Rptr. 3d 884, 893-94, 907 (Cal. Ct. App. 2011) (upholding an officer's "unqualified authority" to search data stored on an arrestee's Blackberry incident to arrest for driving under the influence).

2. In light of the frequency with which people are arrested with cell phones and the judiciary's confusion over whether the police may search the digital contents of those phones, this Court's intervention is critical. As this Court has remarked, "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459-60 (1981). And insofar as the courts that have spoken on the issue have reached inconsistent results, the Fourth Amendment's protections currently vary according to state and jurisdictional lines.

Such uncertainty and inconsistency should not persist. To the extent that the Fourth Amendment permits cell phone searches incident to arrest, the current confusion over the issue may cause officers to refrain, in an abundance of caution, from undertaking this investigative tactic. On the other hand, if the Fourth Amendment prohibits such searches absent exigent circumstances or a warrant, officers may be conducting searches that violate legitimate expectations of privacy. Yet all law enforcement agencies can do at the moment is lament, as one agency does in its training materials, that the law in this area is "ambiguous" and "remains

unclear."[9] As one veteran of the New York State Police force recently remarked, the "time is rapidly approaching when the Supreme Court must decide the issue and provide a comprehensive statement on the subject."[10]

B. Additional Percolation Would Not Aid This Court's Consideration Of The Issue.

There is no good reason to delay resolution of the question presented in the hopes that additional lower court opinions will unearth new legal theories or converge on a uniform legal regime.

1. The issue has now been thoroughly ventilated. Numerous federal appellate and state supreme court decisions have explored the legal arguments arising from searching cell phones seized during arrests. Indeed, at least nine such decisions have already been issued – most with dissenting opinions – and

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[9] Mass. Mun. Police Training, Legal Update: Searching Cell Phones Incident to Arrest 2 (2012), *available at* http://www.mass.gov/eopss/docs/mptc/cell-phone.pdf; *see also* Clark, *supra*, at 26-30 (FBI bulletin noting this "uncertainty"); Computer Crime & Intellectual Prop. Section, Criminal Div., U.S. Dep't of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations 32-33 (2009), *available at* http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf (noting that courts have "disagreed" about whether searching a cell phone incident to arrest is permissible).

[10] Terrence P. Dwyer, *Cell Phones, Privacy, and the Fourth Amendment*, PoliceOne.com (Aug. 10, 2012), http://www.policeone.com/investigations/articles/5907286-Cell-phones-privacy-and-the-Fourth-Amendment/.

some dedicating dozens of pages to the issue. *See supra* Part I.B. (By comparison, when the Solicitor General recommended, and this Court granted, certiorari in *United States v. Jones*, 132 S. Ct. 945 (2012), involving the propriety of warrantless GPS tracking, there were only four such opinions on the issue. *See* Pet. for Writ of Cert. at 20-23, *Jones*, 132 S. Ct. 945 (No. 10-1259).) These courts now openly acknowledge the increasing division. *See, e.g.*, *United States v. Wurie*, ___ F.3d ___, 2013 WL 2129119, at *5 (1st Cir. May 17, 2013); *United States v. Flores-Lopez*, 670 F.3d 803, 805 (7th Cir. 2012); *Smallwood v. State*, 113 So. 3d 724, 733 n.5 (Fla. 2013); *People v. Diaz*, Pet. App. 47a n.17 (Cal. 2011). The First Circuit recently refused to consider the issue en banc, with two judges deeming such a rehearing pointless and calling instead for this Court to resolve the issue. *United States v. Wurie*, ___ F.3d ___, 2013 WL 3869965 (1st Cir. July 29, 2013).

In addition, there is a rich body of academic scholarship exploring the doctrinal and policy-related consequences of different legal regimes that might govern this issue. One article surveys the different approaches that a court might take without itself taking a position. *See* Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. Rev. 27 (2008). Another article argues that warrantless cell phone searches incident to arrest should be categorically prohibited. *See* Charles R. Maclean, *But, Your Honor, a Cell Phone Is Not a Cigarette Pack: An Immodest Call for a Return to the* Chimel *Justifications for Cell Phone Memory Searches Incident to Arrest*, 6 Fed. Cts. L. Rev. 37 (2012). Still others contend that such searches should be permitted only under certain

circumstances. *See, e.g.*, Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 Harv. J. L. & Pub. Pol'y 403 (2013); Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 183 (2010); Eunice Park, *Traffic Ticket Reasonable, Cell Phone Search Not: Applying the Search-Incident-to-Arrest Exception to the Cell Phone as "Hybrid,"* 60 Drake L. Rev. 429 (2012).[11]

2. Additional percolation is particularly unlikely to reap any benefits in light of the nature of courts' disagreement over the question presented. On one side of the split, courts believe that this Court's decisions in *Robinson* and the other cases from the 1970's constitute "binding precedent" that requires

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[11] There also are a number of student-authored works offering perceptive analyses. *See, e.g.*, Byron Kish, Comment, *Cellphone Searches: Works Like a Computer, Protected Like a Pager?*, 60 Cath. U. L. Rev. 445 (2011); Jana L. Knott, Note, *Is There an App for That? Reexamining the Doctrine of Search Incident to Arrest in the Context of Cell Phones*, 35 Okla. City U. L. Rev. 445 (2010); Ben E. Stewart, Note, *Cell Phone Searches Incident to Arrest: A New Standard Based on* Arizona v. Gant, 99 Ky. L.J. 579 (2010-2011); Chelsea Oxton, Note, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 Creighton L. Rev. 1157 (2010); Leanne Anderson, People v. Diaz*: Warrantless Searches of Cellular Phones, Stretching the Search Incident to Arrest Exception Beyond the Breaking Point*, 39 W. St. U. L. Rev. 33 (2011); Ashley B. Snyder, Comment, *The Fourth Amendment and Warrantless Cell Phone Searches: When Is Your Cell Phone Protected?*, 46 Wake Forest L. Rev. 155 (2011); J. Patrick Warfield, Note, *Putting a Square Peg in a Round Hole: The Search-Incident-to-Arrest Exception and Cellular Phones*, 34 Am. J. Trial Advoc. 165 (2010).

treating searches of cell phones identically to searches of any other objects. *Diaz*, Pet. App. 47a; *see also id.* at 51a (Kennard, J., concurring) (agreeing with the majority's approval of unrestricted cell phone searches "[u]nder the compulsion of directly applicable Supreme Court precedent"); *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007) (treating *Robinson* as controlling); *Flores-Lopez*, 670 F.3d at 805 (characterizing *Finley* and *Murphy* as relying on a "literal reading" of *Robinson*). Accordingly, these courts opine that "[i]f . . . the wisdom of [this Court's] decisions 'must be newly evaluated' in light of modern technology, then that reevaluation must be undertaken by the high court itself." *Diaz*, Pet. App. 47a (citation omitted).

On the other side of the split, courts do not think that this Court's prior cases control the outcome here. These courts perceive the digital contents of cell phones as being qualitatively different than the simple, physical items that this Court has previously treated as automatically searchable. *Smallwood*, 113 So. 3d at 731-32. That being so, these courts maintain that "*Robinson* is neither factually nor legally on point," *id.* at 730, and that it is perfectly "compatible" with this Court's jurisprudence to forbid the police from searching cell phones under the search-incident-to-arrest doctrine, *Wurie*, 2013 WL 2129119, at *10.

Only this Court can decide which of these two conflicting views of its precedent is correct.

III. This Case Is An Excellent Vehicle For The Court To Resolve The Conflict.

The facts of this case, unlike many of the others involving searches of cell phones seized during

arrests, would allow this Court to consider different variations on the propriety of cell phone searches and thus to deliver comprehensive guidance on the issue. This is so for two reasons.

First, this case involves a range of different types of digital content stored on cell phones. The officers in this case examined not only simple text viewable on rudimentary of cell phones but also photos and video recordings more characteristic of smartphones. This case thus affords this Court the opportunity to consider – as one court has suggested might be important, *see Flores-Lopez*, 670 F.3d at 809-10 – whether any particular kinds of digital content present different privacy concerns than others.

Second, petitioner challenges the constitutionality of two distinct searches of his cell phone's digital contents: one at the scene of his arrest and another at the stationhouse several hours later by an officer who was not even present at the scene during the arrest. Many cases present one or the other scenario, but rarely does a case cleanly present both.

This Court's precedent suggests that such temporal and geographic considerations could be relevant to the propriety of searching cell phones seized during arrest. In *United States v. Edwards*, 415 U.S. 800 (1974), this Court upheld a warrantless search of a detainee's clothes that he was still wearing ten hours after his arrest, stating at one point that a "reasonable delay" in effectuating a search incident to arrest does not undermine its legitimacy. *Id.* at 805. On the other hand, this Court has stated that "a search can be incident to arrest only if it is substantially contemporaneous with the arrest," *Stoner v. California*, 376 U.S. 483, 486

(1964), and that a warrantless search incident to arrest must be grounded in the "inherent necessities of the situation *at the time of the arrest*," *Chimel v. California*, 395 U.S. 752, 759 (1969) (emphasis added) (quoting *Trupiano v. United States*, 334 U.S. 699, 705, 708 (1948)). Moreover, this Court explained in *United States v. Chadwick*, 433 U.S. 1 (1977), that "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest if the search is *remote in time or place* from the arrest." *Id.* at 15 (emphasis added) (internal quotation marks and citation omitted). Accordingly, if this Court were to address only a single cell phone search at the scene or later in a stationhouse, it might leave police and lower courts still unsure of the law governing the other situation.

IV. The Fourth Amendment Prohibits Searching The Digital Contents Of A Cell Phone Incident To Arrest.

Contrary to the California Supreme Court's view, the Fourth Amendment forbids police officers from searching cell phones incident to arrest for two reasons. First, once a cell phone is securely in police control, neither of the reasons identified in *Chimel v. California*, 395 U.S. 752 (1969), for conducting searches incident to arrest justifies searching the phone's digital contents. Second, the profound privacy concerns attendant to cell phones make it unreasonable for police officers to search digital content without a warrant.

A. Neither Of The *Chimel* Rationales For Searches Incident To Arrest Is Present Here.

1. As this Court has repeatedly explained, the search-incident-to-arrest exception requires a search to be "'reasonably limited' by the 'need to seize weapons' and 'to prevent the destruction of evidence.'" *Chimel*, 395 U.S. at 764 (quoting *Sibron v. New York*, 392 U.S. 40, 67 (1968)). "If there is no possibility" that the arrestee could gain access to a weapon or destroy evidence, "both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Arizona v. Gant*, 556 U.S. 332, 339 (2009); *see also Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring in the judgment) ("[C]onducting a *Chimel* search is not the Government's right; it is an exception – justified by necessity. . . .").

Neither of the *Chimel* justifications applies to the digital contents of cell phones. While officers may inspect a cell phone's physical components to detect weapons, a phone's *digital* contents – such as text messages, emails, photos, or videos – can never threaten officer safety. Furthermore, once officers separate an arrestee from his phone, they can eliminate any risk that he might destroy digital evidence on the phone. While some courts have speculated that the data in cell phones might be subject to remote "wiping" or destruction, *e.g.*, *United States v. Flores-Lopez*, 670 F.3d 803, 807-09 (7th Cir. 2012), the First Circuit has correctly recognized that officers have at least three options to prevent such action. They may turn off the phone (or put it in airplane mode); place it in an inexpensive bag that

prevents any signals from entering or escaping; or "mirror (copy) the entire cell phone contents . . . without looking at the copy." *United States v. Wurie*, ___ F.3d ___, 2013 WL 2129119, at *9 (1st Cir. May 17, 2013) (citation and internal quotation marks omitted). Thus, once a cell phone is in police custody, "the state has satisfied its immediate interest in collecting and preserving evidence." *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009). If it wishes to search the phone's contents, it may seek a warrant. *Id.*; *cf. Missouri v. McNeely*, 133 S. Ct. 1552, 1562 (2013) (noting that police can now can obtain warrants within minutes).

2. The California Supreme Court resisted this analysis on the ground that this Court's holding in *United States v. Robinson*, 414 U.S. 218 (1973), forecloses it. According to the California Supreme Court, this Court's analysis in that case (and in subsequent cases referencing *Robinson*) affords "no legal basis" for distinguishing between a seized item itself and its contents. *People v. Diaz*, Pet. App. 25a, 43a (Cal. 2011). Once the police seize an item incident to an arrest, they automatically may "*open and examine*" the item – even digital contents within a cell phone. *Id.* 42a.

This reasoning overreads this Court's cases. *Robinson* and other cases discussing its holding stand only for the proposition that, where there is *some chance* that a search is needed to protect police or preserve evidence, courts are not required to engage in a "case-by-case adjudication" to determine "the probability in a particular arrest" that the arrestee in fact has weapons or destructible evidence. *Robinson*, 414 U.S. at 235. Thus, even though it is unlikely that

a cigarette package (or a wallet or purse) might hold a weapon, it is possible it might contain, for instance, a razor blade. Where, however, there is *no chance* that the search is necessary to discover weapons or to preserve evidence, this Court's holdings in *United States v. Chadwick*, 433 U.S. 1, 15 (1977), and *Gant* instruct that the Fourth Amendment prohibits a warrantless search. *See Chadwick*, 433 U.S. at 15 (prohibiting search of a footlocker seized during arrest); *Gant*, 556 U.S. at 343 (same for search of a vehicle incident to arrest).

The California Supreme Court pushed *Chadwick* and *Gant* aside, asserting that they are irrelevant because they "involved a search of the area within an arrestee's immediate control, not of the arrestee's person." Pet. App. 37a n.9; *see also* Pet. App. 32a-33a. Yet – as even another court on California's side of the conflict at issue has recognized – there is no basis in law or logic for distinguishing between the two situations. *See United States v. Curtis*, 635 F.3d 704, 712 (5th Cir. 2011). As this Court explained in *Chimel*, the justification necessary for a search incident to arrest is always the same, regardless of whether the police wish to search an arrestee's person or the area "within his immediate control." 395 U.S. at 762-63. In either case, the search must be justified – at least within the realm of possibility – by the need "to remove any weapons," and "to prevent [evidence] concealment or destruction." *Id.* Once "there is no longer any danger that the arrestee might gain access to [property confiscated incident to arrest] to seize a weapon or destroy evidence," the police may not search the property without obtaining a warrant. *Chadwick*, 433 U.S. at 15.

The California Supreme Court's distinction between property seized from the arrestee's "person" and property seized from his "immediate control" would also lead to arbitrary results. Under such a rule, the police could search the digital contents of any cell phone taken from someone's hands or pockets. But if the police arrested someone in her office, they apparently would be unable to search her phone if at that moment it were sitting on her desk. Or if police arrested the driver of a car, they would be unable to search a phone resting in a cupholder. Governmental access to the most sensitive details of a person's private life should hinge on more than such happenstance.

B. The Profound Privacy Concerns Related To Cell Phones Make It Unreasonable To Search Them Without Warrants.

It is also inappropriate to extend *Robinson* to cell phones because "the electronic devices that operate as cell phones of today are materially distinguishable from the static, limited-capacity" containers of the past. *Smallwood v. State*, 113 So. 3d 724, 732 (Fla. 2013). Unlike those containers, cell phones contain "vast" amounts of "very personal" information – from text-based messages to email (some of which may be confidential business material or privileged work product) to appointment records to photos and videos. *Id.* at 732-33. Indeed, a cell phone is not really even "a 'container' in any normal sense of that word." *Flores-Lopez*, 670 F.3d at 806. It is a mini, yet powerful, computer that happens to include a phone.

A cell phone, therefore, should not be treated as "a closed container for purposes of a Fourth

Amendment analysis." *Smith*, 920 N.E.2d at 954. To hold otherwise – and thus to "allow[] the police to search [the data on a cell phone] without a warrant any time they conduct a lawful arrest" – would "create 'a serious and recurring threat to the privacy of countless individuals.'" *Wurie*, 2013 WL 2129119, at *12 (quoting *Gant*, 556 U.S. at 345); *see also* Elizabeth Woyke, *Debate Over Warrantless Cellphone Searches Heats Up*, Forbes (Sept. 7, 2011), http://www.forbes.com/sites/elizabethwoyke/2011/09/07/debate-over-warrantless-cellphone-searches-heats-up/ (explaining that allowing such searches would expose sensitive information commonly stored on businesspersons' cell phones to governmental view).

The California Supreme Court deemed the distinction between cell phones and ordinary containers immaterial, asserting that this Court's decisions "do not support the view that whether the police must get a warrant before searching an item they have properly seized from an arrestee's person incident to a lawful custodial arrest depends on the item's character, including its capacity for storing personal information." Pet. App. 35a (emphasis omitted). In particular, the California Supreme Court asserted that *New York v. Belton*, 453 U.S. 454 (1981), and *United States v. Ross*, 456 U.S. 798 (1982), "expressly rejected the view that the validity of a warrantless search depends on the character of the searched item." *Diaz*, Pet. App. 36a-37a.

But neither case controls here. As the First Circuit has noted, this Court, "more than thirty-five years ago, could not have envisioned a world in which the vast majority of arrestees would be carrying on their person an item containing not physical evidence

but a vast store of intangible data – data that is not immediately destructible and poses no threat to the arresting officers." *Wurie*, 2013 WL 2129119, at *10. Indeed, this Court in *Belton* characterized a "container" as "any object capable of holding another object." 453 U.S. at 460 n.4. This description bespeaks something that holds physical items, not mere digital text and images.

It bears remembering, moreover, that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). "[T]he reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.'" *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

Applying this traditional default formula to the situation here yields a clear outcome: searching a cell phone without a warrant intrudes on personal privacy to an extraordinary degree, and is unnecessary to serve any legitimate governmental interest this Court has identified in its search-incident-to-arrest cases. Indeed, several current Members of this Court have recognized in the related context of GPS tracking that the Fourth Amendment must be sensitive to new technologies enabling police to easily obtain massive amounts of personal information that, at least as a practical matter, would previously have been inaccessible. *See United States v. Jones*, 132 S. Ct. 945, 955-56 (2012)

(Sotomayor, J., concurring); *id.* at 963-64 (Alito, J., concurring in the judgment). Cell phones have wrought just this kind of technological sea change. Accordingly, the Fourth Amendment should require the detached scrutiny of a neutral magistrate before allowing the police to rummage through the digital contents of such a device. Anything less would unduly safeguard the intimate details of the citizenry's business dealings and private affairs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Patrick Morgan Ford
ATTORNEY AT LAW
1901 First Avenue
Suite 400
San Diego, CA 92101

Kevin K. Russell
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20036

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

July 30, 2013

APPENDIX A

COURT OF APPEAL

Fourth District, Division 1, California

The PEOPLE, Plaintiff and Respondent,

v.

David Leon RILEY, Defendant and Appellant.

D059840 | Filed February 8, 2013

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed. (Super. Ct. No. SCD226240)

McDONALD, J.

A jury convicted defendant David Riley of one count of shooting at an occupied vehicle (Pen. Code, § 246,[1] count 1), one count of attempted murder (§§ 664/187, subd. (a), count 2) and one count of assault with a semi-automatic firearm (§ 245, subd. (b), count 3), and found true numerous enhancements appended to counts 1 through 3.[2] The court sentenced Riley to 15 years to life.

On appeal, Riley contends (1) the court erred when it denied his motions to suppress evidence obtained in the search of his vehicle and the later search of his cell

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] The jury found two firearm enhancements (under § 12022.53, subds. (b) & (e)(1)) in connection with count 2 to be true, and found true that he personally used a firearm within the meaning of section 12022.5, subdivision (a), in connection with count 3, and found true the allegation (as to each count) that he committed the offenses for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b).

phone; (2) the prosecution of the current offenses violated the *Kellett*[3] rule, and (3) the prosecutor engaged in prejudicial misconduct when questioning a witness.

I.

FACTS

A. *Prosecution Evidence*

The Shooting

Riley belonged to the Lincoln Park gang. Around 2:30 p.m. on August 2, 2009, an Oldsmobile belonging to Riley was parked in front of the Urias family home near an intersection in the Skyline neighborhood of San Diego. Riley's girlfriend, Jazmin McKinnie (who lived down the street from the Uriases' house), was standing and talking with three men near Riley's car.

Mr. Webster, a member of a rival gang, drove his car through the intersection. The three men standing near Riley's car fired numerous shots at Webster's car. Webster's car crashed into something. The shooters got into Riley's Oldsmobile and drove away. Numerous shell casings from at least two different guns (a .40 caliber handgun and a .45 caliber handgun) were found at the scene. Police found Riley's Oldsmobile the next day in a Lincoln Park gang area. It was almost completely hidden under a car cover. The three eyewitnesses to the shooting declined to give a positive identification of Riley as one of the shooters, although one of those witnesses said Riley could have been one of the shooters.[4]

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[3] *Kellett v. Superior Court* (1996) 63 Cal. 2d 822 (*Kellett*).

[4] Mr. Haddock was identified as being involved based on a positive identification from an eyewitness, and another man

The Stop and Search

On August 22, 2009, Riley was driving his other car (a Lexus) when he was stopped by police. A search of the car found a .40 caliber handgun and a .45 caliber handgun hidden in a sock inside the engine compartment.[5] Ballistics testing confirmed these two weapons were used in shooting at Webster's car. DNA testing confirmed Riley and two other men were possible contributors for the samples taken from one of the handguns, and Haynes and two other men were possible contributors to the sample taken from the other handgun.

Riley was arrested as a result of this stop and police seized his cell phone. Cell phone records showed Riley's phone was used near the place of the shooting at around the time of the shooting, and was used about 30 minutes later near the location where police found Riley's Oldsmobile. The cell phone contained pictures of Riley making gang signs.

Riley's Jailhouse Statements

While in jail, Riley made several phone calls that were recorded and played to the jury. In an August 24, 2009, phone call, Riley asked the other person (an unidentified female) about "what exactly did my charges say?" When she responded there were "gun charges," he asked, "But did it have – did it have any shooting stuff? It just had gun charges[,] right?" When she told Riley it was limited to gun charges and driving without a license, he asked, "No type of

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belonging to Riley's gang (Mr. Haynes) was tied to the shooting by DNA evidence found on the gun used in the shooting.

[5] The facts surrounding the stop and search are more fully discussed below.

shooting or any . . .” and she replied, “it had some other stuff. I don’t know what it means though,” and Riley stated, “it would say like attempted something or something like that.” In another phone call two days later, he mentioned “like no way that that shit is, it’s gonna come back to me like no matter what, the ballistics, it’s gonna show. . . .” In another call that day, he told McKinnie his “main focus” was getting bailed out and “[t]he reason why I’m trying to get bailed out is because I know what they got and I know what’s [going to] hit eventually.” During that same call, after telling her he was “trying to hit third world countries . . . [bec]ause I’m trying to get, really,” Riley stated, “I’m waiting for these . . . mother fuckin’ whoopties [6] to come back . . . and it’s a rap, so before then, I’m trying to be 5000, 50, 50 world states up out [of] this mother fucker though.”

Gang Evidence

A gang expert testified to Riley’s membership in the Lincoln Park gang, the rivalry between Riley’s gang and the gang to which the shooting victim belonged, and why the shooting could have been motivated to further the Lincoln Park gang.

II.

ANALYSIS OF RILEY’S SEARCH AND SEIZURE CLAIM

Riley contends the trial court erred when it denied his motions to suppress the evidence obtained in the search of his car, which yielded the handgun, and the search of his cell phone, which yielded videos and photographs showing Riley’s gang affiliation.

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[6] McKinnie testified a “whooptiwopper” or “whooptiwham” is slang that can mean a gun.

A. *Relevant Facts from the Suppression Hearing*

The Stop and Impound Decision

About three weeks after the shooting, San Diego Police Officer Dunnigan stopped Riley because the registration tags on Riley's Lexus had expired. After learning Riley was driving with a suspended driver's license, Dunnigan asked him to get out of the car because he intended to impound it. Just before Riley got out of the car, he started to reach into his pocket and Dunnigan warned Riley not to do so. Riley replied he was reaching for his cell phone. Dunnigan decided to impound Riley's car because, with few exceptions, the policy of the police department is to impound and tow a vehicle when the driver who is stopped is driving without a valid license, because police want to ensure the person with the suspended license cannot return to the car and drive away.

Discovery of the Guns

Dunnigan testified that, when an officer decides to impound a vehicle, departmental policy requires that police conduct an inventory search of the vehicle. The primary reason for an impound inventory search is to limit the City's liability by protecting against claims that items in the car at the time of the impound were missing when the car is returned to the owner. The list of items on the impound slip includes items under the hood of the car, including the battery and the alternator, that are to be inventoried.

Dunnigan was standing on the curb with Riley, issuing the citation for driving with a suspended license, when Officer Ruggerio arrived to assist Dunnigan with the stop and the impound and

inventory search. Ruggerio conducted the inventory search, which included looking under the hood. He normally checks under the hood because the impound sheet requires the officer to check off that none of the pieces are missing, and because he has found contraband under the hood on prior occasions. When Ruggerio found the guns under the hood, he showed the guns to Dunnigan, who decided to place Riley under arrest.

At the time of the stop, impound and inventory search, Dunnigan did not know who Riley was or anything about the shooting incident. The decision to stop the car was based on the registration violation, and the decision to impound the car (and the concomitant inventory search) was motivated by Dunnigan's adherence to departmental policy after he learned of Riley's invalid driver's license.

The Cell Phone

After finding the guns and some other gang paraphernalia, and placing Riley under arrest based on the guns, Dunnigan contacted Detective Malinowski, a detective specializing in gangs. Dunnigan contacted Malinowski because of the presence of the loaded guns and because Dunnigan saw several indicia of gang affiliation. One of those indicia was that, when Dunnigan looked at Riley's cell phone, he noticed all of the entries starting with the letter "K" were preceded by the letter "C," which gang members use to signify "Crip Killer."

Detective Malinowski went to the police station in response to Dunnigan's call. At the station, the arresting officers gave the cell phone to Malinowski when he asked for any property found on Riley.

Malinowski looked through the phone and found some video clips of young men street boxing and heard Riley's voice in the background encouraging the fighters. He also found some photographs.

The Ruling

The trial court first evaluated the motion to suppress the guns. It found credible the testimonies of Dunnigan and Ruggerio that they did not know Riley when Dunnigan stopped him, and the officers did not know anything about the shooting investigation or that Malinowski was looking for guns. The trial court also found credible that neither the initial stop (based on the expired registration) nor the decision to impound the car (when Dunnigan learned of the invalid driver's license) were pretextual, and the decision to impound was based on Dunnigan's ordinary practice rather than being motivated by an improper investigatory purpose. It also found the officers were following the police department procedures when they conducted the inventory search, which includes a checklist that specifies looking under the hood, and there were legitimate reasons (including protecting the department against later claims of liability) underlying that general procedure. Accordingly, the court denied the motion to suppress the fruits of the inventory search.

The court reserved ruling on the issue of the cell phone search to consider additional legal authorities. After reading additional authorities, the court stated "the cell phone, which as I understand it was on [Riley's] person at the time of the arrest, would fall into the category of a booking search, the scope of which is very broad," and was therefore inclined to uphold the search. The trial court offered the parties

the opportunity to "see if there's anything else you want me to consider" before it ruled on the cell phone search, and stated it would wait a few days to issue its ruling. When court resumed, it ruled the search of the cell phone was lawful, concluding the reasoning in *People v. Diaz* (review granted October 28, 2008, S166600), an appellate decision then on review before the California Supreme Court and subsequently affirmed and superseded by *People v. Diaz* (2011) 51 Cal. 4th 84 (*Diaz*), made sense and would permit a search of the cell phone found on Riley's person when he was arrested.

B. *Applicable Law*

Inventory Searches

The Fourth Amendment to the United States Constitution protects people from unreasonable government intrusions into their legitimate expectations of privacy and, when a warrantless search is involved, the burden is on the prosecution to justify the search by proving the search fell within a recognized exception to the warrant requirement. (*In re Tyrell J.* (1994) 8 Cal. 4th 68, 76, disapproved on other grounds by *In re Jaime P.* (2006) 40 Cal. 4th 128, 139.)

"[A] law enforcement officer may, consistent with the Fourth Amendment, briefly detain a vehicle if the objective facts indicate that the vehicle has violated a traffic law. The officer's subjective motivation in effecting the stop is irrelevant." (*People v. White* (2001) 93 Cal. App. 4th 1022, 1025.) If the officer determines, during an otherwise lawful stop, that the driver is driving on a suspended license, the officer has justification to impound that vehicle. (*People v.*

Duncan (2008) 160 Cal. App. 4th 1014, 1019; *People v. Benites* (1992) 9 Cal. App. 4th 309, 326 [impoundment proper where neither driver nor passenger had valid driver's license]; *People v. Burch* (1986) 188 Cal. App. 3d 172 [impoundment proper where car's registration tag was expired and driver's license was suspended]; *South Dakota v. Opperman* (1976) 428 U.S. 364, 368-369 (*Opperman*) [as part of their "'community caretaking functions,'" police officers may constitutionally impound vehicles that "jeopardize . . . public safety and the efficient movement of vehicular traffic"].)

When an officer is warranted in impounding a vehicle, a warrantless inventory search of the vehicle pursuant to a standardized procedure is constitutionally reasonable. (*Opperman*, *supra,* 428 U.S. at pp. 371-372.) When an inventory search is conducted based on a decision to impound a vehicle, we "focus on the purpose of the impound rather than the purpose of the inventory," because an inventory search conducted pursuant to an unreasonable impound is itself unreasonable. (*People v. Aguilar* (1991) 228 Cal. App. 3d 1049, 1053.) The language in several United States Supreme Court decisions has suggested that, when considering the validity of an inventory search, the officer's motive for the decision to impound the vehicle can invalidate the inventory search if the decision to impound was subjectively motivated by an improper investigatory purpose. (*See, e.g.*, *Opperman,* at p. 376; *Colorado v. Bertine* (1987) 479 U.S. 367, 372, 376.) Accordingly, California courts have concluded that "[t]he relevant question is whether the impounding was subjectively motivated by an improper investigatory purpose." (*People v. Torres* (2010) 188 Cal. App. 4th 775, 791 (*Torres*).)

Searches of Property Taken from the Defendant's Person Incident to Arrest

The California Supreme Court has recently confirmed that a delayed search of an item immediately associated with the arrestee's person may be justified as incident to a lawful custodial arrest without consideration as to whether an exigency for the search exists. (*Diaz*, *supra,* 51 Cal. 4th 84.) In *Diaz,* as here, police conducted a postarrest search of a cell phone found on the defendant's person. (*Id.* at p. 89.) On appeal from the denial of his motion to suppress, the defendant argued the search of his cell phone "'was too remote in time' to qualify as a valid search incident to his arrest. In making this argument, he emphasize[d] that the phone 'was exclusively held in police custody well before the search of its text message folder.'" (*Id.* at p. 91, fn. omitted.) In rejecting this argument, the *Diaz* court focused on one key question: "whether defendant's cell phone was 'personal property . . . immediately associated with [his] person' [citation] . . . ." (*Id.* at p. 93.) As the court explained, "[i]f it was, then the delayed warrantless search was a valid search incident to defendant's lawful custodial arrest. If it was not, then the search, because it was "'remote in time [and] place from the arrest,'" 'cannot be justified as incident to that arrest' unless an 'exigency exist[ed].'" (*Id.* at p. 93, fn. omitted.) Ultimately, the *Diaz* court held the cell phone was immediately associated with the defendant's person and, therefore, the warrantless search of the cell phone was valid, stating that "[b]ecause the cell phone was immediately associated with defendant's person, [the officer] was 'entitled to inspect' its contents without a warrant [citation] at the sheriff's station 90 minutes after defendant's arrest,

whether or not an exigency existed." (*Id.* at p. 93, fn. omitted.)

Standard of Review

In ruling on a motion to suppress, the trial court judges the credibility of the witnesses, resolves any conflicts in the testimony, weighs the evidence, and draws factual inferences. We will uphold the court's express and/or implied findings on such matters if they are supported by substantial evidence, but we independently review the application of the relevant law to the facts. (*People v. Alvarez* (1996) 14 Cal. 4th 155, 182.)

C. *Analysis*

The Inventory Search

There is substantial evidence to support the conclusion that both the initial stop and the subsequent decision to impound the car were based on legitimate motives rather than as a ruse to conduct an investigatory search. Dunnigan testified, and the trial court found credible, that he did not know Riley (and was unaware Riley might have been involved in the shootings) when he decided to impound the vehicle, and that his decision to impound was based on the fact Riley did not have a valid driver's license and was consistent with Dunnigan's ordinary practice. There was also substantial evidence that the scope of the inventory search was based on legitimate reasons rather than being motivated by an improper investigatory purpose: the officers were following police department procedures when they conducted the inventory search, which includes a checklist that specifies looking under the hood to assess what was present under the hood, and there was evidence that

legitimate reasons (e.g., protecting the department against later claims of liability when the impounded vehicle is returned to the owner) underlay that general procedure.

The cases cited by Riley do not undermine our conclusion. In *People v. Williams* (2006) 145 Cal. App. 4th 756, a driver was stopped and presented a valid driver's license; however, the driver could not present a registration or proof of insurance for the car, which was validly registered to a car rental company and had not been reported stolen. The officer arrested the defendant based on an outstanding warrant and impounded the car. The court concluded the impound was invalid because, after noting the police department had no written policy addressing when a car should be impounded and such decision was left entirely to each officer's discretion, it reasoned:

> The prosecution, which had the burden of establishing that impounding appellant's car was constitutionally reasonable under the circumstances, *made no showing that removal of the car from the street furthered a community caretaking function*. Morton admitted that the car was legally parked in front of appellant's residence, appellant had a valid driver's license, the car was properly registered to a car rental company, the car had not been reported stolen, and he had no reason to believe appellant was not in lawful possession of the car. [¶] . . . [¶] No community caretaking function was served by impounding appellant's car. The car was legally parked at the curb in front of appellant's home. . . . *Because appellant had a valid driver's license and the car was properly registered, it was not*

> *necessary to impound it to prevent immediate and continued unlawful operation.*

(*Id.* at pp. 762-763, italics added.)

In contrast, the prosecution here *did* satisfy its burden of establishing that impounding appellant's car was constitutionally reasonable under the circumstances by showing removal of the car from the street furthered a community caretaking function: Riley did not have a valid license, and the car did not have a valid registration. Impounding was necessary to prevent the immediate and continued unlawful operation of the car.

The decision in *Torres*, *supra*, 188 Cal. App. 4th 775 is even less apposite. In *Torres*, the deputy pulled the defendant over for an unsafe lane change and failure to signal a turn. The defendant driver parked in a stall in a public parking lot and got out of the truck, and told the officer he did not have a valid driver's license. The deputy decided to impound the truck. (*Id.* at p. 780.) The defendant contended the search was a prohibited, "pretextual" inventory search because the deputy conceded at the suppression hearing that narcotics officers had asked him to manufacture a reason to detain and search the truck, and the deputy agreed he decided to impound the truck "'to facilitate an inventory search' to look 'for whatever narcotics-related evidence might be in the [truck].'" (*Id.* at p. 786.) The court concluded the impound and inventory search were unreasonable, noting:

> The relevant issue is the deputy's motive for impounding the truck – did he impound the truck to serve a community caretaking function

> or as a pretext for conducting an investigatory search? The record on that motion – namely, the preliminary hearing transcript – shows an investigatory motive. The deputy testified he decided to impound the truck "in order to facilitate an inventory search" because narcotics officers had asked him to "develop some basis for stopping" defendant. The deputy agreed he "basically us[ed] the inventory search as the means to go look for whatever narcotics-related evidence might be in the [truck]." (*Cf. Opperman*, *supra*, 428 U.S. at p. 376 [inventory search may not be "a pretext concealing an investigatory police motive"]; *Bertine*, *supra*, 479 U.S. at p. 376 [inventory search improper when police officers impound vehicle "in order to investigate suspected criminal activity"].) [¶] . . . The deputy did not claim defendant's lack of a license was the sole motivation for the impounding. [Citation.] . . . And he did not offer any community caretaking function served by impounding defendant's truck. The prosecution failed to show the truck was illegally parked, at an enhanced risk of vandalism, impeding traffic or pedestrians, or could not be driven away by someone other than defendant.

(*Torres*, *supra*, 188 Cal. App. 4th at pp. 789-790).

In contrast, the officer here testified he did not even know who Riley was when he stopped him. Moreover, the officer explained he was motivated to impound the car because Riley did not have a valid license, not because the officer was instructed to develop a basis to conduct an inventory search, and the unregistered status of the vehicle precluded

someone other than the defendant from simply driving it away. *Torres* has no application here.

The Cell Phone Search

Diaz controls the present case, and the key question is whether Riley's cell phone was "immediately associated" with his "person" when he was stopped. (*Diaz*, *supra*, 51 Cal. 4th at p. 93.) Relying on the evidence introduced at the suppression hearing, the trial court found "the cell phone, which as I understand it was on [Riley's] person at the time of the arrest, would fall into the category of a booking search, the scope of which is very broad," and on this basis upheld the search. This finding, supported by the evidence, establishes that Riley's cell phone was immediately associated with his person when he was arrested, and therefore the search of the cell phone was lawful whether or not an exigency still existed. (*Diaz, supra,* 51 Cal. 4th at p. 93.)

Riley argues *Diaz* is not controlling because there was some evidence, subsequently introduced at trial, showing he had taken the cell phone from his pocket and placed it on the seat of the car, and therefore the phone was not "immediately associated" with his "person" when he was arrested. However, the People correctly point out that an appellate challenge to a ruling on a pretrial evidentiary motion to suppress and exclude evidence "must be reviewed on the record as it existed when the court decided the motion" (*Torres*, *supra*, 188 Cal. App. 4th at p. 780; cf. *People v. Welch* (1999) 20 Cal. 4th 701, 739), not on evidence later introduced at trial.

III

THE "*KELLETT*" CLAIM

Riley argues the current prosecution is barred by the *Kellett* rule.

A. *Background*

In the first filed case (the weapons case), Riley was charged with carrying concealed firearms in a vehicle (former Pen. Code, § 12025, subd. (a)(1)) and carrying loaded firearms in a public place (former Pen. Code, § 12031, subd. (a)(1)). The weapons case was apparently filed based on the guns found during the August 22, 2009, stop and search of his vehicle. Riley pleaded guilty to those charges on October 8, 2009. The probation and sentencing hearing on those convictions was trailed to the present case, and he was ultimately sentenced on the weapons case at the same hearing sentence was imposed in the present case.

In the present case, filed approximately five months after he entered his guilty plea – but before sentencing – in the weapons case, Riley was charged with (among other things) shooting at an occupied vehicle, attempted murder, and assault with a semi-automatic firearm. Riley subsequently filed a motion in the present case arguing prosecution was barred under the *Kellett* rule. His motion asserted the prosecution was, or should have been, aware that all of the offenses charged in the weapons case and the present case were ones in which the same act or course of conduct played a significant part, within the meaning of section 654, which barred the second prosecution. The prosecution's written opposition argued *Kellett* applies only when the offenses arise out of the same act, incident, or course of conduct within

the meaning of section 654, but does not apply when the acts are distinct, and the charges in the weapons case involved criminal conduct distinct from that underlying the charges in the present case. The prosecution also asserted *Kellett* applies only when the prosecution knows or should have known of the separate offenses, and argued *Kellett* was therefore inapplicable because the evidence demonstrated the prosecution lacked forensic evidence tying Riley to the current offenses until after he had already pleaded guilty to the weapons case.

B. *Applicable Law*

Section 654 prohibits both multiple punishment and multiple prosecution. In *Kellett*, *supra*, 63 Cal. 2d 822, the Supreme Court, construing section 654 in the context of the legislative policy of section 954, explained the different purposes of the two clauses of section 654. The prohibition against multiple punishment is designed "to ensure that a defendant's punishment will be commensurate with his culpability." (*People v. Correa* (2012) 54 Cal. 4th 331, 341.) Multiple prosecution, on the other hand, is prohibited to avoid "needless harassment and the waste of public funds . . . ." (*Kellett*, at p. 827.) The prohibition does not come into play unless "the prosecution is or should be aware of more than one offense *in which the same act or course of conduct plays a significant part* . . . ." (*Id.* at p. 827, italics added.) Under *Kellett,* if these criteria are met *and* the first proceeding "culminate[s] in either acquittal or conviction and sentence," the later prosecution can be barred. (*Id.* at p. 827.)

C. *Analysis*

We conclude Riley's *Kellett* claim must be deemed forfeited. The court in *People v. Jones* (1998) 17 Cal. 4th 279, 313 noted a claim based on *Kellett* may not be raised on appeal if not preserved at trial, an application of the general rule that a defendant may not raise on appeal an argument not pursued at trial. (*People v. Clark* (1993) 5 Cal. 4th 950, 988, fn. 13, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal. 4th 390, 421, fn. 22.) This prohibition has particular force when the argument involves disputed factual issues not resolved below. (*See, e.g.*, *People v. Zito* (1992) 8 Cal. App. 4th 736, 742.)

Although Riley did file a motion raising *Kellett*, the record contains no information that, once the prosecution filed its opposition pointing out the defects in the motion, Riley ever sought a ruling on his motion. It is not enough to merely file a motion, because a "defendant may forfeit the issue for appellate review by failing to press for a hearing or by acquiescing in the court's failure to hear the . . . motion." (*People v. Braxton* (2004) 34 Cal. 4th 798, 814; accord, *People v. Brewer* (2000) 81 Cal. App. 4th 442, 459-462.) Here, Riley's apparent abandonment of his *Kellett* motion leaves a crucial evidentiary vacuum, because there was no opportunity for the trial court to make the factual determination of whether the prosecution knew (or in the exercise of reasonable diligence should have known) there was enough evidence to prosecute Riley for the present case at the time it filed the weapons case. (*Cf. Barriga v. Superior Court* (2012) 206 Cal. App. 4th 739, 748 [whether the government exercised due diligence is a question of fact].) Indeed, in the specific context of a *Kellett* claim,

our Supreme Court in *People v. Davis* (2005) 36 Cal. 4th 510 noted there is a "recognized . . . exception to the multiple-prosecution bar where the prosecutor 'is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.' [Citations.] . . . But this exception applies only when the government 'acted with due diligence at the outset but was unable to discover the additional facts necessary to sustain the greater charge.' [Citation.] Whether the government exercised due diligence is a question of fact." (*Id.* at p. 558.) We conclude that, having deprived the prosecution of the opportunity to have dispositive factual issues resolved in a manner that could have been fatal to Riley's *Kellett* motion, Riley has forfeited his *Kellett* claim.[7]

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[7] Riley asserts that we should nevertheless reach the issue to forestall a claim of ineffective assistance of counsel. However, that claim requires, among other things, a showing there was "a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal. 4th 926, 1003.) We have substantial doubt Riley can satisfy that showing, because the prosecution presented significant reasons for why it neither knew nor should have known of the present case at the time it filed the weapons case. More importantly, *Kellett*'s bar applies only when "the initial proceedings culminate in either acquittal or *conviction and sentence*." (*Kellett, supra,* 63 Cal. 2d at p. 827, italics added.) Here, the probation and sentencing hearing on the convictions in the weapons case was trailed to the present case, and he was ultimately sentenced on the weapons case at the same hearing sentence was imposed on the present case. Under those circumstances, it appears *Kellett* would *not* bar the second prosecution. (*See In re R.L.* (2009) 170 Cal. App. 4th 1339, 1343-1344; *cf. People v. Andrade* (1978) 86 Cal. App. 3d 963, 971; *People v. Tideman* (1962) 57 Cal. 2d 574, 586; *People v. Hartfield*

IV

THE PROSECUTORIAL MISCONDUCT CLAIM

Riley contends an implied reference at trial to his custodial status requires reversal on appeal because it was so inflammatory it denied him a fair trial.

A. *Background*

Riley's sister was called as a defense witness to testify that Riley often loaned his Oldsmobile to friends. On cross-examination, she conceded she had not told police of this fact until sometime in early 2011, and had told the defense of this fact in December 2010. In an attempt to show this claim was a recent fabrication planted by Riley, the prosecutor asked if she had first told the defense investigator of this fact on January 21, 2011, just one day after she had met with her brother. When Riley's sister responded, "I don't remember the date I visited [Riley]," the prosecutor asked, "If I showed you the visitor['s] log, would it refresh your recollection?" The court interrupted and, after an unreported sidebar conference, the prosecutor rephrased the question to ask whether she had talked to Riley before she spoke with the investigator, and she responded "[y]es."

After testimony concluded, the court made a record of the unreported sidebar. The court stated the visitor's log referred to by the prosecutor was likely a jail log, and the court had required the prosecutor to rephrase the question because the jury had not been told Riley was in custody and steps had been taken to

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(1970) 11 Cal. App. 3d 1073, 1080; *People v. Winchell* (1967) 248 Cal. App. 2d 580, 588.)

avoid alerting the jury to Riley's custodial status. Riley, arguing the jury could "glean" that the log referred to a jail log, moved for a mistrial. The court, noting it did not believe there was intentional conduct by the prosecutor to bring the jail issue before the jury, denied the motion for a mistrial.

B. *Legal Framework*

The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" (*People v. Gionis* (1995) 9 Cal. 4th 1196, 1214.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal. 4th 806, 820.) However, to preserve a claim of misconduct on appeal, a defendant must both object and request a curative admonition (*People v. Montiel* (1993) 5 Cal. 4th 877, 914), and not doing so forfeits the claim of misconduct. (*People v. Silva* (2001) 25 Cal. 4th 345, 373.)

C. *Analysis*

Although Riley apparently objected to the reference, he did not request a curative admonition. Accordingly, the claim is forfeited. Riley argues, relying on *People v. Hill* (1998) 17 Cal. 4th 800, a defendant is excused from that requirement when a request for a curative instruction would have been futile. However, the court's observation in *People v.*

Dykes (2009) 46 Cal. 4th 731 requires that we reject Riley's argument that he was excused from the requirements of objection and request for an admonition:

> Defendant contends that his failure to object to various asserted instances of misconduct should not stand as a barrier to appellate review of his claims. He argues that an objection and admonition would have been futile, because the misconduct was pervasive and created a "hostile trial atmosphere." As our discussion has demonstrated, the prosecutor did not engage in pervasive misconduct. Defendant's reliance upon *People v. Hill, supra,* 17 Cal. 4th 800, is misplaced. Unlike that case, which we have characterized as representing an "extreme" example of pervasive and corrosive prosecutorial misconduct that persisted throughout the trial [citation], the present case did not involve counsel experiencing – as did counsel in *Hill* – a "constant barrage" of misstatements, demeaning sarcasm, and falsehoods, or ongoing hostility on the part of the trial court, to appropriate, well-founded objections.

(*Id.* at pp. 774-775.)

Here, the alleged misconduct was a single question that only briefly and indirectly alluded to the possibility Riley had been in custody several months earlier. "The isolated reference to [a defendant's custodial status] was not so grave that a curative instruction would not have mitigated any possible prejudice to defendant." (*People v. Valdez* (2004) 32 Cal.4th 73, 125.) We conclude Riley's claim of misconduct is forfeited.

DISPOSITION

The judgment is affirmed.

WE CONCUR:

NARES, Acting P.J.

McINTYRE, J.

APPENDIX B

Court of Appeal, Fourth Appellate District,

Division One – No. D059840

S209350

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DAVID LEON RILEY, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED
May -1 2013
Frank A. McGuire Clerk
Deputy

CANTIL SAKAUYE
Chief Justice

APPENDIX C

Filed 1/3/11

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GREGORY DIAZ, Defendant and Appellant.	S166600 Ct. App. 2/6 B203034 Ventura County Super. Ct. No. 2007015733

We granted review in this case to decide whether the Fourth Amendment to the United States Constitution permits law enforcement officers, approximately 90 minutes after lawfully arresting a suspect and transporting him to a detention facility, to conduct a warrantless search of the text message folder of a cell phone they take from his person after the arrest. We hold that, under the United States Supreme Court's binding precedent, such a search is valid as being incident to a lawful custodial arrest. We affirm the Court of Appeal's judgment.

FACTUAL BACKGROUND

About 2:50 p.m. on April 25, 2007, Senior Deputy Sheriff Victor Fazio of the Ventura County Sheriff's Department witnessed defendant Gregory Diaz participating in a police informant's controlled purchase of Ecstasy. Defendant drove the Ecstasy's seller to the location of the sale, which then took place in the backseat of the car defendant was driving. Immediately after the sale, Fazio, who had listened in

on the transaction through a wireless transmitter the informant was wearing, stopped the car defendant was driving and arrested defendant for being a coconspirator in the sale of drugs. Six tabs of Ecstasy were seized in connection with the arrest, and a small amount of marijuana was found in defendant's pocket. Defendant had a cell phone on his person.

Fazio transported defendant to a sheriff's station, where a detective seized the cell phone from defendant's person and gave it to Fazio. Fazio put it with the other evidence and, at 4:18 p.m., interviewed defendant. Defendant denied having knowledge of the drug transaction. After the interview, about 4:23 p.m., Fazio looked at the cell phone's text message folder and discovered a message that said "6 4 80."[1] Based on his training and experience, Fazio interpreted the message to mean "[s]ix pills of Ecstasy for $80." Within minutes of discovering the message (and less than 30 minutes after the cell phone's discovery), Fazio showed the message to defendant. Defendant then admitted participating in the sale of Ecstasy.

Defendant was charged with selling a controlled substance (Health & Saf. Code, § 11379, subd. (a)). He pleaded not guilty and moved to suppress the fruits of the cell phone search – the text message and the statements he made when confronted with it – arguing that the warrantless search of the cell phone violated the Fourth Amendment. The trial court denied the motion, explaining: "The defendant was under arrest for a felony charge involving the sale of drugs. His

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[1] Fazio had to manipulate the phone and go to several different screens to access the text message folder. He did not recall whether the cell phone was on when he picked it up to look through it.

property was seized from him. Evidence was seized from him. [¶] . . . [I]ncident to the arrest[,] search of his person and everything that that turned up is really fair game in terms of being evidence of a crime or instrumentality of a crime or whatever the theory might be. And under these circumstances I don't believe there's authority that a warrant was required." Defendant then withdrew his not guilty plea and pleaded guilty to transportation of a controlled substance. The trial court accepted the plea, suspended imposition of sentence, and placed defendant on probation for three years.

The Court of Appeal affirmed, finding that under governing high court precedent, because the cell phone "was immediately associated with [defendant's] person at the time of his arrest," it was "properly subjected to a delayed warrantless search." We granted defendant's petition for review.

DISCUSSION

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Under this provision, as the United States Supreme Court has construed it, warrantless searches – i.e., "searches conducted outside the judicial process, without prior approval by judge or magistrate" – "are *per se* unreasonable . . . subject only to a few specifically established and well-delineated

exceptions." (*Katz v. United States* (1967) 389 U.S. 347, 357, fns. omitted.)

One of the specifically established exceptions to the Fourth Amendment's warrant requirement is "a search incident to lawful arrest." (*United States v. Robinson* (1973) 414 U.S. 218, 224 (*Robinson*).) This exception "has traditionally been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained. [Citation.]" (*United States v. Edwards* (1974) 415 U.S. 800, 802-803 (*Edwards*).) As the high court has explained: "When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless 'search of the arrestee's person and the area "within his immediate control" . . . .' [Citations.] [¶] Such searches may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. [Citations.]" (*United States v. Chadwick* (1977) 433 U.S. 1, 14-15 (*Chadwick*).)[2]

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[2] The area within an arrestee's immediate control is "'the area from within which [the arrestee] might gain possession of a

The People argue that the warrantless search in this case of the cell phone's text message folder was valid as a search incident to defendant's lawful arrest.[3] Defendant disagrees, arguing that the search "was too remote in time" to qualify as a valid search incident to his arrest.[4] In making this argument, he emphasizes that the phone "was exclusively held in police custody well before the search of its text message folder."

Resolution of this issue depends principally on the high court's decisions in *Robinson*, *Edwards*, and *Chadwick*. In *Robinson*, a police officer arrested the defendant for driving with a revoked operator's permit. (*Robinson*, *supra*, 414 U.S. at p. 220.) The officer conducted a patdown search and felt an object he could not identify in the breast pocket of the defendant's coat. He removed the object, which turned out to be a crumpled up cigarette package. He felt the package and determined it contained objects that were not cigarettes. He then opened the package and found 14 heroin capsules. (*Id.* at pp. 222-223.) The high court held that the warrantless search of the package was valid under the Fourth Amendment. (*Robinson*, *supra*, at p. 224.) It explained that, incident to a lawful custodial arrest, police have authority to conduct "a full search of the [arrestee's] person." (*Id.* at p. 235.) This authority, the court continued, exists whether or

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weapon or destructible evidence.' [Citations.]" (*Chadwick*, *supra*, 433 U.S. at p. 14.)

[3] The People do not contest that defendant had a protected expectation of privacy in the contents of his text message folder. For purposes of this opinion, we therefore assume defendant had such an expectation, and do not consider the issue.

[4] Defendant does not question the legality of either his arrest or his phone's warrantless seizure. He challenges only the validity of the warrantless search of the phone's text message folder.

not the police have reason to believe the arrestee has on his or her person either evidence or weapons. "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search [of the person] incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." (*Ibid.*) Applying these principles, the court held: "The search of [the defendant's] person . . . and the seizure from him of the heroin, were permissible under established Fourth Amendment law. . . . Having in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct. [Citations.]" (*Id.* at p. 236, fns. omitted.)

In *Edwards*, after lawfully arresting the defendant late one night for attempting to break into a post office, police took him to jail and placed him in a cell. (*Edwards*, *supra*, 415 U.S. at p. 801.) Ten hours later, suspecting that his clothes might contain paint chips from the window through which he had tried to enter, police made the defendant change into new clothes and held his old ones as evidence. (*Id.* at p. 802; see also *id.* at p. 810 (dis. opn. of Stewart, J.).) Subsequent examination of the old clothes revealed paint chips matching samples taken from the window. (*Id.* at p. 802.) The high court held that both the warrantless seizure of the clothes and the warrantless search of

them for paint chips were valid as a search incident to lawful arrest. (*Id.* at pp. 802-809.) It expressly rejected the argument that, because the search occurred "after the administrative mechanics of arrest ha[d] been completed and the prisoner [was] incarcerated," the search of the clothes was too remote in time to qualify as a search incident to arrest. (*Id.* at p. 804.) The court explained: "[O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant *even though a substantial period of time has elapsed* between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration." (*Id.* at pp. 807-808, fns. omitted, italics added.)

In *Chadwick*, *supra*, 433 U.S. 1, the high court cut back on the seemingly broad rule *Edwards* had announced. In *Chadwick*, federal narcotics agents observed the defendants load a 200-pound, double-locked footlocker into the trunk of a car. Having probable cause to believe the footlocker contained illegal contraband, the agents arrested the defendants and transported them to a federal building, along with the car and the footlocker. There, 90 minutes after the arrest and without obtaining a warrant or consent, the agents opened the footlocker and found marijuana

inside. (*Chadwick*, *supra*, at pp. 4-5.) The high court rejected the argument that the warrantless search was valid as a search incident to arrest. It first reaffirmed the principle that, because of "[t]he potential dangers lurking in all custodial arrests," police may conduct a warrantless search incident to arrest "whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence." (*Id.* at p. 14.) "However," the court explained, "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' [citation], or no exigency exists. Once law enforcement officers have reduced luggage or other personal property *not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." (*Id.* at p. 15, italics added.) Under this principle, the court held, because "the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after [the defendants] were securely in custody," it could not "be viewed as incidental to the arrest or as justified by any other exigency." (*Ibid.*) In reaching this conclusion, the court did not overrule *Robinson* or *Edwards*, but distinguished them as involving warrantless searches "of the person" rather than searches "of possessions within an arrestee's immediate control." (*Chadwick*, at p. 16, fn. 10.) The former searches, the court explained, are "justified by" the "reduced expectations of privacy caused by the arrest"; the latter are not. (*Ibid.*) Thus, the defendants'

"privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest." (*Ibid.*)

Under these decisions, the key question in this case is whether defendant's cell phone was "personal property . . . immediately associated with [his] person" (*Chadwick*, *supra*, 433 U.S. at p. 15) like the cigarette package in *Robinson* and the clothes in *Edwards*. If it was, then the delayed warrantless search was a valid search incident to defendant's lawful custodial arrest. If it was not, then the search, because it was "'remote in time [and] place from the arrest,'" "cannot be justified as incident to that arrest" unless an "exigency exist[ed]."[5] (*Chadwick*, *supra*, at p. 15.)

We hold that the cell phone was "immediately associated with [defendant's] person" (*Chadwick*, *supra*, 433 U.S. at p. 15), and that the warrantless search of the cell phone therefore was valid. As the People explain, the cell phone "was an item [of personal property] on [defendant's] person at the time of his arrest and during the administrative processing at the police station." In this regard, it was like the clothing taken from the defendant in *Edwards* and the cigarette package taken from the defendant's coat pocket in *Robinson*, and it was unlike the footlocker in *Chadwick*, which was separate from the defendants' persons and was merely within the "area" of their "'immediate control.'" (*Chadwick*, *supra*, 433 U.S. at p. 15.) Because the cell phone was immediately associated with defendant's person, Fazio was

[5] The approximately 90-minute delay between defendant's arrest and the search of his cell phone was substantially similar to the 90-minute delay the high court held to be too remote in *Chadwick*.

"entitled to inspect" its contents without a warrant (*Robinson*, *supra*, 414 U.S. at p. 236) at the sheriff's station 90 minutes after defendant's arrest, whether or not an exigency existed.[6]

In arguing otherwise, defendant first asserts that, in deciding whether his cell phone is "the equivalent of" the cigarette package in *Robinson* or the footlocker in *Chadwick*, we should focus on its "character," not on the mere fact he was carrying it on his person. As defendant interprets the high court cases, a warrant is necessary for a delayed search unless the seized item is "clothing, or an article or container typically kept on or inside of clothing, or otherwise by its very nature carried on the arrestee's person." For two reasons, defendant argues, cell phones do not meet these criteria. First, they "are not necessarily or routinely[] worn, carried in a pocket, or attached to a person or his clothes," but are "more often kept *near* [their] owner[s], within [their] reach . . . inside a briefcase, backpack, or purse, or on a car seat or table, or

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[6] Given our conclusion, we need not address the People's argument that an exigency existed because a cell phone's contents "are dynamic in nature and subject to change without warning – by the replacement of old data with new incoming calls or messages; by a mistaken push of a button; by the loss of power; by a person contacting the cellular phone provider; or by a person pre-selecting the 'cleanup' function on the cellular phone, which limits the length of time messages are stored before they are automatically deleted." We note, however, that the People have offered no evidence to support this claim. Nor have they offered evidence as to whether text messages deleted from a cell phone may be obtained from the cell phone's provider. (*See* Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence* (2010) 50 Santa Clara L. Rev. 183, 199 ["text messages are feasibly accessible for about two weeks from the cellular provider"].)

plugged into a power source, or stashed inside any manner of separate bags or carrying containers." Second, cell phones "contain[] quantities of personal data unrivaled by any conventional item of evidence traditionally considered to be 'immediately associated with the person of the arrestee,' such as an article of clothing, a wallet, or a crumpled cigarette box found in an arrestee's pocket," and therefore implicate heightened "privacy concerns" that warrant treating them "like . . . the footlocker in *Chadwick*."[7] The dissent endorses defendant's latter point, asserting that *all* cell phones should be exempt from the rule of *Robinson*, *Edwards*, and *Chadwick*, because the amount of personal information cell phones can store "dwarfs that which can be carried on the person in a spatial container." (Dis. opn. of Werdegar, J., *post*, at pp. 60a-61a.)

The relevant high court decisions do not support the view that whether police must get a warrant before searching an item they have properly seized *from an arrestee's person* incident to a lawful custodial arrest depends on the item's character, including its capacity for storing personal information. As noted above, *Chadwick* explains that a delayed warrantless search "of the person" (*Chadwick*, *supra*, 433 U.S. at p. 16, fn. 10) – which includes property "immediately associated with the person" at the time of arrest (*id.* at p. 15), but excludes property that is only "within an arrestee's immediate control" (*id.* at p. 16, fn. 10) – is

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[7] Defendant's argument implicitly recognizes that courts commonly hold that delayed warrantless searches of wallets found on arrestees' persons are valid searches incident to arrest. (*See*, *e.g.*, *United States v. Passaro* (9th Cir. 1980) 624 F.2d 938, 943-944).

valid because of "reduced expectations of privacy caused by the arrest." (*Ibid.*) *Robinson* states that if a custodial arrest is lawful, then a "full" search of the arrestee's person "requires no additional justification." (*Robinson*, *supra*, 414 U.S. at p. 235.) *Edwards* states that "once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other." (*Edwards*, *supra*, 415 U.S. at p. 807.) Nothing in these decisions even hints that whether a warrant is necessary for a search of an item properly seized from an arrestee's person incident to a lawful custodial arrest depends in any way on the character of the seized item.

Moreover, in analogous contexts, the high court has expressly rejected the view that the validity of a warrantless search depends on the character of the searched item. In *United States v. Ross* (1982) 456 U.S. 798, 825 (*Ross*), the court held that police who have probable cause to believe a lawfully stopped car contains contraband may conduct a warrantless search of any compartment or container in the car that may conceal the object of the search. As relevant here, the court stated that whether a particular container may be searched without a warrant does *not* depend on the character of the container, explaining: "[A] constitutional distinction between 'worthy' and 'unworthy' containers would be improper. Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch

buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction." (*Id.* at p. 822, fn. omitted.) "The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted."[8] (*Ross*, at p. 824.) In *New York v. Belton* (1981) 453 U.S. 454 (*Belton*), the court held that police making a lawful custodial arrest of a car's occupant "may, as a contemporaneous incident of that arrest," "examine the contents of *any* containers found within the passenger compartment." (*Id.* at p. 460, italics added.) As relevant here, the court rejected the proposition that whether a particular container may be searched without a warrant depends on the extent of the arrestee's reasonable expectation of privacy in that container, explaining: "[A]ny container[] . . . [in] the passenger compartment . . . may . . . be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that *the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have*."[9] (*Belton*, at pp. 460-

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[8] In reaching this conclusion, the high court in *Ross* rejected the view of several lower court judges who had concluded that, based on differing expectations of privacy, the warrantless search of a brown paper bag in Ross's stopped car was valid, but the warrantless search of a zippered leather pouch was not. (*Ross*, *supra*, 456 U.S. at p. 802.)

[9] In *Arizona v. Gant* (2009) 556 U.S. 332, 335, the high court limited *Belton*, *supra*, 453 U.S. 454, by holding that police may not search containers in a vehicle's passenger compartment "incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle," unless "it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." At the same time, the court reaffirmed

461, italics added.) Under *Ross*, *Belton*, and the other high court decisions discussed above, there is no legal basis for holding that the scope of a permissible warrantless search of an arrestee's person, including items immediately associated with the arrestee's person, depends on the nature or character of those items.

Regarding the particular focus of defendant and the dissent on the alleged storage capacity of cell phones, for several reasons, the argument is unpersuasive. First, the record contains no evidence regarding the storage capacity of cell phones in general or of defendant's cell phone in particular. Second, neither defendant nor the dissent persuasively explains why the sheer quantity of personal information should be determinative. Even "small spatial container[s]" (dis. opn. of Werdegar, J., *post*, at p. 54a) that hold less information than cell phones may contain highly personal, intimate and *private* information, such as photographs, letters, or diaries.[10]

Belton's holding that whether a particular container may be searched does not depend on its character or the extent of the arrestee's expectation of privacy in it. (*Gant*, 556 U.S. at p. 345 [in permissible warrantless search, police may search "every purse, briefcase, or other container within" the car's passenger compartment].) *Gant* is not otherwise relevant here, as it involved a search of the area within an arrestee's immediate control, not of the arrestee's person. (*Id.* at p. 335.)

[10] The dissent does not question that police may examine personal photographs found upon an arrestee's person, but objects that the high court has not held that police may read the contents of a letter or diary seized from an arrestee's person. (Dis. opn. of Werdegar, J., *post*, at p. 56a-57a, fn. 7.) However, several of the court of appeals decisions the high court in *Edwards* cited with approval on the issue of delayed searches (*Edwards*, *supra*, 415 U.S. at pp. 803-804, fn. 4) upheld the warrantless examination,

If, as the high court held in *Ross*, "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [has] an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case" (*Ross*, *supra*, 456 U.S. at p. 822), then travelers who carry sophisticated cell phones have no greater right to conceal personal information from official inspection than travelers who carry such information in "small spatial container[s]."[11] (Dis. opn. of Werdegar, J., *post*, at p. 54a) And if, as the high court held in *Belton*, differing expectations of privacy based on whether a container is open or closed are irrelevant to the validity of a warrantless search incident to arrest (*Belton*, *supra*, 453 U.S. at p. 461), then differing expectations of privacy based on the amount of information a particular item contains should also be irrelevant. Regarding the quantitative analysis of defendant and the dissent, the salient point of the high court's decisions is that a "lawful custodial arrest justifies the infringement of *any* privacy interest the arrestee may have" in property immediately associated

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incident to arrest, of diaries or personal papers found upon the arrestee's person. (See *United States v. Gonzalez-Perez* (5th Cir. 1970) 426 F.2d 1283, 1285-1287 [papers contained in pockets, wallets, and purse]; *United States v. Frankenberry* (2d Cir. 1967) 387 F.2d 337, 339 [diary]; *Cotton v. United States* (9th Cir. 1967) 371 F.2d 385, 392 [papers contained in pockets]; *Grillo v. United States* (1st. Cir. 1964) 336 F.2d 211, 213 [paper contained in wallet].)

[11] Were the rule otherwise, those carrying small spatial containers, which are legally subject to seizure *and search* if found upon the person at the time of arrest, would find little solace in discovering that their intimate secrets would have been protected if only they had used a device that could hold more personal information.

with his or her person at the time of arrest (*ibid.*, italics added), even if there is no reason to believe the property contains weapons or evidence (*Robinson*, *supra*, 414 U.S. at p. 235). Third, even were it true that the amount of personal information *some* cell phones can store "dwarfs that which can be carried on the person in a spatial container" (dis. opn. of Werdegar, J., *post,* at pp. 60a-61a) – and, again, the record contains no evidence on this question – defendant and the dissent fail to explain why this circumstance would justify exempting *all* cell phones, including those with limited storage capacity, from the rule of *Robinson*, *Edwards*, and *Chadwick*.[12] A warrantless search, incident to a lawful arrest, of a cell phone with limited storage capacity does not become constitutionally unreasonable simply because other cell phones may have a significantly greater storage capacity.

Finally, adopting the quantitative approach of defendant and the dissent would create difficult line-drawing problems for both courts and police officers in the field. How would a court faced with a similar argument as to another type of item determine whether the item's storage capacity is constitutionally

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[12] According to the United States Department of Justice, drug traffickers commonly use disposable cell phones, because they are relatively inexpensive and difficult to trace. (Nat. Drug Intelligence Center, U.S. Dept. J., Midwest High Intensity Drug Trafficking Area Drug Market Analysis 2009 (Mar. 2009) <http://www.justice.gov/ndic/pubs32/32775/distro.htm> [as of Jan. 3, 2011].) Such phones have limited storage capacity. (Ferro, *Cell phones: disposable mobile phone finally hits the US* (May 31, 2008) TECH.BLORGE Technology News <http://tech.blorge.com/Structure:%20/2008/05/31/cell-phones-disposable-mobile-phones-finally-hits-the-us/> [as of Jan. 3, 2011].)

significant? And how would an officer in the field determine this question upon arresting a suspect? Defendant and the dissent offer no guidance on these questions. Their approach would be "inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts" that the high court has condemned. (*Thornton v. United States* (2004) 541 U.S. 615, 623; see also *Belton*, *supra*, 453 U.S. at pp. 458-459.) Similar concerns led the high court in *Robinson* to adopt the "straightforward," "easily applied, and predictably enforced" rule that "'a full [warrantless] search of the person'" is constitutionally permissible, and to "reject[] the suggestion that 'there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.' [Citation.]" (*Belton*, *supra*, 453 U.S. at p. 459, quoting *Robinson*, *supra*, 414 U.S. at p. 235.) Adopting the quantitative approach of defendant and the dissent, under which the validity of a warrantless search would turn on the amount of personal information a particular item might contain, would be contrary to these high court precedents. (See *United States v. Murphy* (4th Cir. 2009) 552 F.3d 405, 411 [in upholding warrantless search incident to arrest, refusing to distinguish cell phones based on their "large" storage capacity because of difficulty quantifying that term "in any meaningful way"].)

Defendant next argues that, in determining whether a warrant was necessary, we should distinguish between *the cell phone itself* and its *contents*. According to defendant, "[t]here is little about a cell phone's *content* that is conceptually linked

to or inextricably associated with the physical body or the inherent attributes of the arrestee's person. A cell phone's data content is not at all like a pair of pants or even a piece of paper folded up inside a wallet that has been tucked inside the pocket of a pair of pants." It "cannot be worn or 'carried' on one's person." "[T]he nature of the evidence that a cell phone may contain, and the fact that the cell phone 'container' is readily differentiated from the cell phone 'content,' warrants treating the cell phone content differently from the seized cell phone itself." The dissent makes a similar argument, distinguishing between "the arrestee's actual person" and the cell phone's content – i.e., the stored data – and arguing that the loss of "*bodily* privacy" that justifies a warrantless "search of an arrestee's person" upon arrest does not also justify the search of a cell phone found upon the arrestee's person. (Dis. opn. of Werdegar, J., *post*, at pp. 63a-63a.)

These arguments are inconsistent with the high court's decisions. Those decisions hold that the loss of privacy upon arrest extends beyond the arrestee's body to include "personal property . . . immediately associated with the person of the arrestee" at the time of arrest. (*Chadwick*, *supra*, 433 U.S. at p. 15.) They also hold, contrary to the dissent's suggestion, that this loss of privacy entitles police not only to "seize" anything of importance they find on the arrestee's body (dis. opn. of Werdegar, J., *post*, at p. 63a.), but also *to open and examine* what they find. Thus, the court in *Robinson* held that a police officer, despite seizing a cigarette package from the defendant's shirt pocket and reducing it to police control, did not need to obtain a warrant before opening the package and examining its contents. (*Robinson*, *supra*, 414 U.S. at

p. 236.) Similarly, the court in *Edwards* held that the police, despite seizing the defendant's clothes and reducing them to police control, did not need to obtain a warrant before subjecting those clothes to laboratory testing. (*Edwards*, *supra*, 415 U.S. at pp. 802-809.) In both cases, the high court expressly refused to distinguish the contents of the seized item from either the seized item itself or "the arrestee's actual person." (Dis. opn. of Werdegar, *post*, at p. 64a.) As the court later explained in *Belton* in refusing to draw a constitutional distinction between the seizure of an item and a search of that item: "[U]nder this fallacious theory, no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his [or her] 'exclusive control.'" (*Belton*, *supra*, 453 U.S. at pp. 461-462, fn. 5.) Under these high court decisions, in determining the validity of a search incident to arrest, there is no legal basis for distinguishing the contents of an item found upon an arrestee's person from either the seized item itself or "the arrestee's actual person."[13] (Dis. opn. of Werdegar, J., *post*, at p. 64a.)

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[13] Defendant insists that *Edwards* is "limited by its facts to the delayed search of an article of clothing." However, the court's discussion more broadly addressed "other belongings" (*Edwards*, *supra*, 415 U.S. at p. 804) and "effects in [the arrestee's] possession" (*id.* at p. 807). We do not consider ourselves free to disregard this discussion, especially in light of *Robinson*, which did not involve clothing, and *Chadwick*, which reaffirmed the validity of delayed warrantless searches of "personal property . . . immediately associated with the person of the arrestee." (*Chadwick*, *supra*, 433 U.S. at p. 15.) Defendant alternatively suggests that *Edwards* validates delayed warrantless searches only of "'effects still in the defendant's possession at the place of detention, such as the defendant's clothing.'" Again, the high

The dissent makes several arguments in addition to defendant's, but they are also unpersuasive. Although conceding that *Robinson*, *Edwards*, and *Chadwick*, "reasonably read," authorize delayed warrantless searches "of containers" immediately associated with an arrestee's person, the dissent asserts that cell phones are exempt from this rule because they are not "'containers' within the meaning of the high court's search decisions." (Dis. opn. of Werdegar, J., *post*, at p. 62a.) However, application of the rule of *Robinson*, *Edwards*, and *Chadwick* turns not on whether the item in question constitutes a "container," but on whether it is "property," *i.e.*, a "belonging[]" or an "effect[]."[14] (*Edwards*, *supra*, 415 U.S. at pp. 803-804, 807-808; see also *Chadwick*, *supra*, 433 U.S. at p. 15; *Robinson*, *supra*, 414 U.S. at pp. 229, 232.) The dissent's attempt to limit the reach of that rule to "clothing and small spatial containers" (dis. opn. of Werdegar, J., *post*, at p. 61a) finds no support in the language of the high court's governing decisions. In this respect, the language of those decisions is entirely consistent with the Fourth Amendment itself, which protects "[t]he right of the people to be secure in their persons, houses, papers, *and effects*." (Italics added.) It is also consistent with

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court's opinion is not so limited; the court stated that a delayed warrantless search is valid "where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the subsequent criminal trial." (*Edwards*, *supra*, at p. 807.)

[14] The word "container" does not appear in *Robinson* and *Edwards*. It appears once in *Chadwick*, in a footnote where the high court explained that the defendant's principal privacy interest in the footlocker was "not in the container itself . . . but in its contents." (*Chadwick*, *supra*, 433 U.S. at pp. 13-14, fn. 8.)

one of the justifications for the search incident to arrest exception: "the reasonableness of searching for . . . *evidence* of crime when a person is taken into official custody and lawfully detained. [Citation.]" (*Edwards*, *supra*, 415 U.S. at pp. 802-803, italics added.) Contrary to the dissent's analysis, whether an item of personal property constitutes a "container" bears no relation to this justification.[15]

The dissent also errs in asserting that the high court's "rationale" for allowing delayed warrantless searches incident to arrest is of "doubtful" applicability to "items that are easily removed from the arrestee's possession and secured by the police." (Dis. opn. of Werdegar, J., *post*, at p. 58a.) In *Edwards*, the high court declared it "plain that searches and seizures that [may] be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." (*Edwards*, *supra*, 415 U.S. at p. 803.) The rationale for this rule, the court explained, is that the arrestee is "no more imposed upon" by a delayed search "than he [or she] could have been" by a warrantless search "at the time and place of the arrest. . . ." (*Id.* at p. 805.) There is "little difference," the court reasoned, between conducting the search at

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[15] The high court did discuss containers in the decisions we have cited as involving "analogous contexts." (*Ante*, at pp. 10-12.) In this respect, our analysis is consistent with the weight of authority. (*State v. Boyd* (Conn. 2010) 992 A.2d 1071, 1089, fn. 17 ["A number of courts have analogized cell phones to closed containers and concluded that a search of their contents is, therefore, valid under the automobile exception or the exception for a search incident to arrest."].) Moreover, contrary to the dissent's analysis, nothing in these analogous decisions purports to limit the rule of *Robinson*, *Edwards*, and *Chadwick* to property that classifies as a container.

the place of arrest and conducting it later at the place of detention. (*Id.* at p. 803.) This analysis is consistent with the high court's earlier statement in *Robinson* that "[a] police officer's determination as to how *and where* to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." (*Robinson*, *supra*, 414 U.S. at p. 235, first italics added.) It is also consistent with the high court's subsequent statement in *Chadwick* that a delayed warrantless search of personal property immediately associated with the person of an arrestee at the time of arrest is justified by the "reduced expectations of privacy caused by the arrest." (*Chadwick*, *supra*, 433 U.S. at p. 16, fn. 10.) Contrary to the dissent's assertion, the rationale of these decisions – that a delayed search of an item of personal property found upon an arrestee's person no more imposes upon the arrestee's constitutionally protected privacy interest than does a search at the time and place of arrest – fully applies to the delayed search of defendant's cell phone.[16]

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[16] Not satisfied with the high court's explicit explanations, the dissent, citing just two of the 20 court of appeals decisions *Edwards* string-cited on the point (see *Edwards*, *supra*, 415 U.S. at pp. 803-804, fn. 4), asserts that the high court's "rationale is to avoid logistically awkward or embarrassing public searches." (Dis. opn. of Werdegar, J., *post*, at p. 58a.) This assertion finds no support in the language of the high court's decisions, no doubt because making the validity of a delayed search turn on the logistics or potential embarrassment of a public search would, like the dissent's quantitative approach, require "the sort of ad hoc determinations on the part of officers in the field and reviewing courts" that the high court has condemned. (*Thornton v. U.S.*, *supra*, 541 U.S. at p. 623.)

For the reasons discussed above, we hold that, under the United States Supreme Court's binding precedent, the warrantless search of defendant's cell phone was valid. If, as the dissent asserts, the wisdom of the high court's decisions "must be newly evaluated" in light of modern technology (dis. opn. of Werdegar, J., *post*, at p. 52a), then that reevaluation must be undertaken by the high court itself.[17]

DISPOSITION

The judgment of the Court of Appeal is affirmed.

CHIN, J.

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[17] Only a few published decisions exist regarding the validity of a warrantless search of a cell phone incident to a lawful custodial arrest. Most are in accord with our conclusion. (*See, e.g., United States v. Murphy*, *supra*, 552 F.3d at p. 412 [citing *Edwards* in holding that "once [the defendant's] cell phone was held for evidence, other officers and investigators were entitled to conduct a further review of its contents . . . without seeking a warrant"]; *United States v. Finley* (5th Cir. 2007) 477 F.3d 250, 260, fn. 7 [arrestee's cell phone "does not fit into [*Chadwick*'s] category of 'property not immediately associated with [his] person' because it was on his person at the time of his arrest"]; *United States v. Wurie* (D. Mass. 2009) 612 F. Supp. 2d 104, 110 [upholding delayed search of cell phone, finding "no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant's person that" have been upheld under *Edwards*].)

In a closely divided (four to three) opinion, the Supreme Court of Ohio held otherwise, reasoning that "because a person has a high expectation of privacy in a cell phone's contents," police, after seizing a cell phone from an arrestee's person, "must . . . obtain a warrant before intruding into the phone's contents." (*State v. Smith* (Ohio 2009) 920 N.E.2d 949, 955.) The Ohio court's focus on the extent of the arrestee's expectation of privacy is, as previously explained, inconsistent with the high court's decisions.

WE CONCUR:

KENNARD, Acting C.J.
BAXTER, J.
CORRIGAN, J.
GEORGE, J.*

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* Retired Chief Justice of California, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CONCURRING OPINION BY KENNARD, ACTING C.J.

The majority holds that the police may, without obtaining a warrant, view or listen to information electronically stored on a mobile phone that a suspect was carrying when lawfully arrested. The dissent disagrees. I explain why I join the majority rather than the dissent.

On June 8, 1982, California voters enacted an initiative measure known as Proposition 8. Among other things, Proposition 8 added to the California Constitution a "Right to Truth-in-Evidence" provision (Cal. Const., art. 1, § 28, former subd. (d) [now subd. (f)(2)]). That provision generally prohibits exclusion of relevant evidence in a criminal proceeding on the ground that the evidence was obtained unlawfully. Because the federal Constitution is "the supreme law of the land" (U.S. Const., art. VI, § 2), and thus prevails over conflicting state constitutional provisions, the state Constitution's "Right to Truth-in-Evidence" provision does not apply when relevant evidence must be excluded because it was obtained in violation of the federal Constitution's Fourth Amendment, which prohibits "unreasonable searches and seizures." As a result, in California criminal proceedings all issues related to the suppression of evidence derived from police searches and seizures are now determined by application of federal constitutional law. (*People v. Lenart* (2004) 32 Cal. 4th 1107, 1118; *People v. Sapp* (2003) 31 Cal. 4th 240, 267; *People v. Bradford* (1997) 15 Cal. 4th 1229, 1291.) On issues of federal constitutional law, the decisions of the United States Supreme Court are controlling. (*Gates v.*

Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 692.)

As the majority explains, three decisions of the United States Supreme Court compel the result in this case. Those decisions are *United States v. Robinson* (1973) 414 U.S. 218 (*Robinson*), *United States v. Edwards* (1974) 415 U.S. 800 (*Edwards*), and *United States v. Chadwick* (1977) 433 U.S. 1 (*Chadwick*). Under *Robinson* and *Chadwick*, a warrant is not required to conduct a "full search of the person" incident to a lawful arrest (*Robinson,* at p. 235), and the police may examine an object found during the search to determine whether it contains evidence of crime (*id.* at p. 236), so long as the object is one that is "immediately associated with the person of the arrestee" (*Chadwick*, at p. 15). Under *Edwards*, this search and inspection need not occur at the time and place of the arrest; it may occur even after "a substantial period of time has elapsed." (*Edwards*, at p. 807.)

When carried in clothing (rather than inside luggage or a similar container), a mobile phone is personal property that is "immediately associated with the person of the arrestee" (*Chadwick*, *supra*, 433 U.S. 1, 15). Accordingly, under controlling high court decisions, police may, without obtaining a warrant, inspect a mobile phone carried by a suspect at the time of arrest, by viewing or listening to its electronically stored data, including text messages, even when a substantial time has elapsed since the arrest.

The dissent asserts that in light of the vast data storage capacity of "smart phones" and similar devices, the privacy interests that the federal Constitution's Fourth Amendment was intended to protect would be

better served by a rule that did not allow police "to rummage at leisure through the wealth of personal and business information that can be carried on a mobile phone or handheld computer merely because the device was taken from an arrestee's person." (Dis. opn., *post*, at p. 65a.) The dissent also asserts that the three high court decisions I have mentioned are not binding here because they "were not made with mobile phones, smartphones and handheld computers – none of which existed at the time – in mind." (Dis. opn., *post*, at p. 61a.) In my view, however, the recent emergence of this new technology does not diminish or reduce in scope the binding force of high court precedents.

I join the majority rather than the dissent because the United States Supreme Court has cautioned that on issues of federal law all courts must follow its directly applicable precedents, even when there are reasons to anticipate that it might reconsider, or create an exception to, a rule of law that it has established. (*Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477, 484.) The high court has reserved to itself alone "the prerogative of overruling its own decisions." (*Ibid.*; see *Scheiding v. General Motors Corp.* (2000) 22 Cal. 4th 471, 478.)

Under the compulsion of directly applicable United States Supreme Court precedent, I join the majority in affirming the Court of Appeal's judgment.

KENNARD, ACTING C. J.

DISSENTING OPINION BY WERDEGAR, J.

I respectfully dissent. The majority concludes police may search the data stored on an arrestee's mobile phone without a warrant, as they may search clothing (see *United States v. Edwards* (1974) 415 U.S. 800 (*Edwards*)) or small physical containers such as a crumpled cigarette package (see *United States v. Robinson* (1973) 414 U.S. 218 (*Robinson*)) taken from the person of an arrestee. In my view, electronic communication and data storage devices carried on the person – cellular phones, smartphones and handheld computers – are not sufficiently analogous to the clothing considered in *Edwards* or the crumpled cigarette package in *Robinson* to justify a blanket exception to the Fourth Amendment's warrant requirement. A particular context-dependent balancing of constitutionally protected privacy interests against the police interests in safety and preservation of evidence led the United States Supreme Court, over 30 years ago, to hold searches of the arrestee's person reasonable despite the lack of probable cause or a warrant and despite substantial delay between the arrest and the search. (See *United States v. Chadwick* (1977) 433 U.S. 1, 14-15 (*Chadwick*).) Today, in the very different context of mobile phones and related devices, that balance must be newly evaluated.[1]

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[1] The separately concurring justice correctly observes that we must follow directly applicable decisions from the United States Supreme Court even if we think them due for reexamination. (*Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477, 484.) But where high court precedent is not on all fours with the case at bar, we also must remember that the language of Supreme Court decisions is to "be read in the light of the facts of the case under discussion" and that "[g]eneral expressions transposed to other facts are often misleading." (*Armour & Co. v.*

The potential intrusion on informational privacy involved in a police search of a person's mobile phone, smartphone or handheld computer is unique among searches of an arrestee's person and effects. A contemporary smartphone[2] can hold hundreds or thousands of messages, photographs, videos, maps, contacts, financial records, memoranda and other documents, as well as records of the user's telephone calls and Web browsing.[3] Never before has it been

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Wantock (1944) 323 U.S. 126, 133.) Indeed, the Supreme Court recently emphasized that *stare decisis* should not be used "to justify the continuance of an unconstitutional police practice. . . . in a case that is so easily distinguished from the decisions that arguably compel it." (*Arizona v. Gant* (2009) 556 U.S. 332, 348.)

The facts of the present case, as I will explain, differ in important respects from those that gave rise to the United States Supreme Court decisions in *Robinson*, *Edwards* and *Chadwick*. These precedents, therefore, provide no basis for evading this court's independent responsibility to determine the constitutionality of the search at issue. While we of course have no authority to overrule them, we may and should refrain from applying their language blindly to new and fundamentally different factual circumstances.

[2] PCMag.com's online encyclopedia defines a smartphone as "[a] cellular telephone with built-in applications and Internet access. Smartphones provide digital voice service as well as text messaging, e-mail, Web browsing, still and video cameras, MP3 player and video and TV viewing. In addition to their built-in functions, smartphones can run myriad applications, turning the once single-minded cellphone into a mobile computer." (<http://www.pcmag.com/encyclopedia_term/0,2542,%20t=Smartphone&i=51537,00.asp> [as of Jan. 3, 2011].)

[3] Apple's iPhone 4, HTC's Droid Incredible, and the BlackBerry Torch all can store up to 32 gigabytes of data, which could include thousands of images or other digital files. (*See* <http://www.apple.com/iphone/specs.html>; <http://www.htc.com/us/products/droid-incredible-verizon?view=1-1&sort=0#tech-specs>; and <http://us.blackberry.com/smartphones/

possible to carry so much personal or business information in one's pocket or purse. The potential impairment to privacy if arrestees' mobile phones and handheld computers are treated like clothing or cigarette packages, fully searchable without probable cause or a warrant, is correspondingly great.

Although the record does not disclose the type of mobile phone defendant possessed, I discuss smartphones as well as other mobile phones for two reasons. First, the rule adopted by the majority – that an electronic device carried on the person is for Fourth Amendment purposes indistinguishable from an individual's clothing or a small spatial container – is broad enough to encompass all types of handheld electronic data devices, including smartphones such as iPhones and BlackBerry devices, as well as other types of handheld computers. While I disagree with the majority's holding on the validity of the search here, I agree that the permissibility of a search incident to arrest should not depend on the features or technical specifications of the mobile device, which could be difficult to determine at the time of arrest.[4] Second, smartphones make up a growing share of the United States mobile phone market and are likely to be pervasive in the near future. (See Gershowitz, *The iPhone Meets the Fourth Amendment*, *supra*, 56

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blackberrytorch/#!phone-specifications> [all as of Jan. 3, 2011].) On the capabilities of smartphones generally, *see* Gershowitz, *The iPhone Meets the Fourth Amendment* (2008) 56 UCLA L. Rev. 27, 29-30.

[4] But *see* Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence* (2010) 50 Santa Clara L. Rev. 183, 222 (proposing to distinguish smartphones from "older generation cellular phones" by presence of a touch screen or full keyboard, and to impose stricter limits on searches of smartphones).

UCLA L. Rev. at p. 29 ["It does not take a crystal ball to predict that such devices will be ubiquitous in the United States within a few years."].)[5] The question of when and how they may be searched is therefore an important one.

Warrantless searches incident to arrest are justified by the important interests in officer safety and preservation of evidence. "When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless 'search of the arrestee's person and the area "within his immediate control"– construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.'" (*Chadwick*, *supra*, 433 U.S. at p. 14, quoting *Chimel v. California* (1969) 395 U.S. 752, 763.)

Weapons, of course, may be hidden in an arrestee's clothing or in a physical container on the person. But there is apparently no "app" that will turn an iPhone or any other mobile phone into an effective weapon for use against an arresting officer (and if there were,

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[5] In the third quarter of 2010 alone, for example, more than 20 million smartphones were reportedly sold in the United States, up from about 14.5 million in the second quarter of 2010 and 9.7 million in the same quarter of 2009. (Bilton, *The Race to Dominate the Smartphone Market*, N.Y. Times Bits Blog (Nov. 1, 2010) <http://bits.blogs.nytimes.com/2010/11/01/apple-and-google-excel-in-u-s-smartphone-growth/> [as of Jan. 3, 2011]; Hamblen, *OS War Has Android on Top in U.S. Smartphone Sales* (Aug. 12, 2010) Computerworld <http://www.computerworld.com/s/article/9180624/OS_war_has_Android_on_top_in_U.S._smartphone_sales > [as of Jan. 3, 2011].)

officers would presumably seek to disarm the phone rather than search its data files). Clearly, any justification for the warrantless search of a mobile phone must come from the possibility that the arrestee might, during the arrest, destroy evidence stored on the phone.

Once a mobile phone has been seized from an arrestee and is under the exclusive control of the police, the arrestee, who is also in police custody, cannot destroy any evidence stored on it.[6] At that point a search of its stored data would seem to require a warrant, for "when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." (*Chadwick*, *supra*, 433 U.S. at p. 15.) As the majority notes (maj. opn., *ante*, at p. 34a, fn. 6), no evidence of exigency was presented in this case – no evidence that the text messages on defendant's phone were subject to imminent loss and could not, in any event, be obtained from defendant's cellular provider.[7]

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[6] Defendant did not challenge the seizure of his phone, only the search of the data stored on it. Nor do I contend the police needed a warrant or probable cause to take defendant's phone from him and secure it. Once secured, the phone could have been searched later if a warrant, founded on probable cause, issued for the search.

[7] At oral argument, the Attorney General noted that data on some smartphones can be remotely wiped, which might allow an accomplice to destroy evidence on the phone even while the arrestee remains in custody and the phone in police control. As an argument for warrantless searching, this proves too much. A suspect arrested in his or her home or office might also leave behind a computer with evidence that could be destroyed by an accomplice while the arrestee is in custody, but this possibility does not entitle police to search the contents of such computers

We are left, then, with the claim, accepted by the majority, that a mobile phone, like clothing and other items carried on the arrestee's person, may, under *Edwards*, be searched without a warrant even after the item has been secured and the suspect taken into custody, if it could have been searched at the time and place of arrest. (*See Edwards*, *supra*, 415 U.S. at pp. 803-804, 807-808.) As to clothing and small physical containers, the law, in effect, indulges a fiction that an item that was on the arrestee's person when he was detained is *still* on his person – and thus vulnerable to destruction of evidence – notwithstanding that the arrestee is safely in custody and the item securely in police control. (*See New York v. Belton* (1981) 453 U.S. 454, 466 (dis. opn. of Brennan, J.) [characterizing holding in *Belton*, which allowed a vehicle interior to be searched incident to arrest, as resting on "a fiction – that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car"]; Butterfoss, *As Time Goes By: The Elimination of Contemporaneity and Brevity as Factors in Search and Seizure Cases* (1986) 21 Harv. C.R.-C.L. L. Rev. 603, 625 [broadly read, *Edwards* represented a "radical shift" in approach to the

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without probable cause or a search warrant. In either circumstance (home computer or handheld computer) an immediate search without waiting for a warrant might be desirable from the perspective of efficient policing, but "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." (*Mincey v. Arizona* (1978) 437 U.S. 385, 393.) In any event, it appears that remote wiping can be avoided by removing the smartphone's battery and/or storing the phone in a shielded container, as law enforcement officers are being trained to do. (*See* Grubb, *Remote Wiping Thwarts Secret Service*, ZDNet (Australian ed., May 18, 2010) <http://www.zdnet.com.au/remote-wiping-thwarts-secret-service-339303239.htm> [as of Jan. 3, 2011].)

delayed-search problem, by which an exigency exception to the traditional contemporaneity rule displaced the rule itself].)

Beyond observing that the defendant in *Edwards* "was no more imposed upon" than if his clothes had been taken from him earlier (*Edwards*, *supra*, 415 U.S. at p. 805), the *Edwards* court did not explain its reasons for allowing delayed warrantless searches incident to arrest. In particular, the high court did not explain what police interest *justified* a delayed warrantless search once the arrestee and his or her effects are safely in police control. But court of appeals decisions cited by the high court (*id.* at pp. 803-804, fn. 4) suggest the rationale is to avoid logistically awkward or embarrassing public searches. (*See United States v. Gonzalez-Perez* (5th Cir. 1970) 426 F.2d 1283, 1287 ["The arresting officers are not required to stand in a public place examining papers or other evidence on the person of the defendant in order for such evidence to be admissible."]; *United States v. DeLeo* (1st Cir. 1970) 422 F.2d 487, 493 ["Were this not to be so, every person arrested for a serious crime would be subjected to thorough and possibly humiliating search where and when apprehended."].) This rationale makes sense as to an arrestee's actual person or clothing – the issue in *Edwards* – but its applicability to items that are easily removed from the arrestee's possession and secured by the police, such as mobile phones, is doubtful. With such items the police choices are not limited to an awkward or cursory on-the-spot search or a thorough warrantless search at the station house. Rather, the item can be taken from the arrestee and securely held until (assuming probable cause for a search exists) a warrant has issued. (*See United States v. Monclavo-Cruz* (9th Cir.

1981) 662 F.2d 1285, 1288 [delayed warrantless search of purse held unreasonable: "The fact that an officer is prevented from conducting a *Chimel/Belton* search, however, is not a sufficient reason to justify a search an hour later at the station. The protective rationale for the search no longer applies."].)

Recently, addressing the search of an arrestee's vehicle, the high court rejected the fictional approach to justification of a search incident to arrest, holding instead "that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." (*Arizona v. Gant*, *supra*, 556 U.S. at p. 343.) Just as the court in *Gant* adopted a narrow reading of *New York v. Belton*, *supra*, 453 U.S. 454, so, too, some courts and commentators have suggested a narrow reading of *Edwards*, in which delayed searches incident to arrest would be per se valid only as to the arrestee's actual person or clothing (which cannot easily be separated from the person at the time of arrest). (*See United States v. Schleis* (8th Cir. 1978) 582 F.2d 1166, 1171 [disapproving station house search of arrestee's locked briefcase]; Butterfoss, *As Time Goes By: The Elimination of Contemporaneity and Brevity as Factors in Search and Seizure Cases*, *supra*, 21 Harv. C.R.-C.L. L. Rev. at p. 626 [noting possibility of reading *Edwards* as dependent on impossibility of taking arrestee's clothes until replacement clothes were available at the jail].) Indeed, the defendant in *Edwards* had objected, and the court of appeals had reversed his conviction, only on grounds that the delayed warrantless seizure of *his clothing* violated the Fourth Amendment to the United States Constitution. (*Edwards*, *supra*, 415 U.S. at p.

802, italics added.) No issue was presented as to the delayed warrantless seizure or search of *a container* carried by an arrestee.

Edwards nonetheless spoke broadly, and *Chadwick* suggests items beyond clothing may be subject to delayed warrantless search if they are "immediately associated with the person of the arrestee." (*Chadwick*, *supra*, 433 U.S. at p. 15; see also *id.* at p. 16, fn. 10 [describing *Robinson* (which involved search of a small container), as well as *Edwards*, as a search "of the person"].) The majority thus reasonably reads existing high court authority as permitting delayed warrantless searches of containers immediately associated with an arrestee's person.

The question is whether the information stored on electronic devices such as mobile phones, as at issue here, may be examined without a warrant under the same rationale. For two reasons, I would hold it may not.

First, as suggested earlier, the amount and type of personal and business information that can be stored on a mobile phone, smartphone or handheld computer, and would become subject to delayed warrantless search under the majority holding, dwarfs that which can be carried on the person in a spatial container.[8] As one federal district court observed in suppressing the fruits of a mobile phone search, "modern cellular phones have the capacity for storing immense amounts

[8] The majority observes that substantial private information can be carried in the nondigital forms of letters and diaries. (Maj. opn., *ante*, at pp. 38a-39a.) Implicit in the majority's argument is the assumption that police may not only take a letter or diary from an arrestee and inventory it, but may, without a warrant, read through all of its contents. Neither this court nor the United States Supreme Court has so held.

of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages." (*United States v. Park* (N.D. Cal., May 23, 2007, No. CR 05-375 SI) 2007 U.S. Dist. Lexis 40596, *21-*22, fn. omitted.) Smartphones, as we have seen, have even greater information storage capacities.

The United States Supreme Court's holdings on clothing and small spatial containers were not made with mobile phones, smartphones and handheld computers – none of which existed at the time – in mind. Electronic devices "contain" information in a manner very different from the way the crumpled cigarette package in *Robinson* contained capsules of heroin. (*See Robinson*, *supra*, 414 U.S. at p. 223.) Electronic devices, indeed, are not even "containers" within the meaning of the high court's search decisions. As the Ohio Supreme Court, rejecting application of the container cases to a mobile phone, noted, "[o]bjects falling under the banner of 'closed container' have traditionally been physical objects capable of holding other physical objects. Indeed, the United States Supreme Court has stated that in this situation, 'container' means 'any object capable of holding another object.'" (*State v. Smith* (Ohio 2009) 920 N.E.2d 949, 954, quoting *New York v. Belton*, *supra*, 453 U.S. at p. 460, fn. 4.)[9]

[9] The *Belton* court stated: "'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located

Second, the grounds for deeming an arrestee to have lost privacy rights in his or her *person* do not apply to the privacy interest in *data* stored on electronic devices. In *Robinson*, the Supreme Court, quoting with approval from a New York case, explained that while warrantless searches of the person are ordinarily unlawful, "'[s]earch of the person becomes lawful when grounds for arrest and accusation have been discovered, and *the law is in the act of subjecting the body of the accused to its physical dominion*.'" (*Robinson*, *supra*, 414 U.S. at p. 232, italics added.) In *Edwards*, the court reasoned that where the state has lawfully taken a person into custody, though not all his privacy interests are destroyed, the arrest "'does – for at least a reasonable time and to a reasonable extent – take *his own privacy* out of the realm of protection from police interest in weapons, means of escape, and evidence.'" (*Edwards*, *supra*, 415 U.S. at pp. 808-809, italics added.) Citing *Robinson* and *Edwards*, the court subsequently distinguished "searches of the person," in which the

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anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." (*New York v. Belton*, *supra*, 453 U.S. at pp. 460-461, fn. 4.) As *Belton* clearly spoke only of objects physically containing other objects, the majority's reliance on that case for the proposition that any "container," whatever the extent of the arrestee's expectation of privacy in it, may be searched incident to arrest (maj. opn., *ante*, at p. 11) is misplaced when it comes to mobile phones and other electronic communication and data storage devices. Still less on point is *United States v. Ross* (1982) 456 U.S. 798, which did not even involve a search incident to arrest. That the high court in *Ross* declined to distinguish among probable cause searches of "paper bags, locked trunks, lunch buckets, and orange crates" carried in automobiles (*id.* at p. 822) hardly requires that an arrestee's mobile phone, smartphone or handheld computer be treated the same as clothing or a crumpled cigarette package.

arrest created a "reduced expectation[] of privacy," from searches of the possessions within an arrestee's control. (*Chadwick*, *supra*, 433 U.S. at p. 16, fn. 10.)

The warrantless search of an arrestee's person thus rests on a relatively simple, intuitively correct idea: the police, having lawful custody of the individual, necessarily have the authority to search the arrestee's body and seize anything of importance they find there. Having been lawfully arrested, with his or her person under the custody and control of the police, the individual can no longer claim in full the personal privacy he or she ordinarily enjoys. It does not follow, however, that the police also have "'dominion'" (*Robinson*, *supra*, 414 U.S. at p. 232) over the entirety of stored messages, photographs, videos, memoranda and other records an arrestee may be carrying on a mobile phone or smartphone. An individual lawfully arrested and taken into police custody necessarily loses much of his or her *bodily* privacy, but does not necessarily suffer a reduction in the *informational* privacy that protects the arrestee's records. That an arrestee's interest in his or her "'own privacy'" (*Edwards*, *supra*, 415 U.S. at p. 809) is severely reduced does not imply a corresponding reduction in privacy of personal and business data. Even when they happen to be stored on a device carried on the person, these records are clearly distinct from the person of the arrestee.

Because the data stored on a mobile phone or other electronic device is easily distinguished from the arrestee's actual person, and in light of the extraordinary potential for invasion of informational privacy involved in searching data stored on such devices, I would hold mobile phones, smartphones and handheld computers are not ordinarily subject to

delayed, warrantless search incident to arrest. In the terms provided by the existing United States Supreme Court authority, search of the information stored on an arrestee's mobile phone or similar device should be treated as the search of an item "within an arrestee's immediate control" rather than a search "of the person." (*Chadwick*, *supra*, 433 U.S. at p. 16, fn. 10.) Once an arrestee's mobile phone or similar device is securely "under the exclusive dominion of police authority" (*id.* at p. 15), the arrest itself no longer serves to authorize a warrantless search of its stored data.

This is not to say police may never examine or search an arrestee's mobile phone without a warrant. Devices carried on the arrestee's person may be seized and secured. Some examination of the device, not amounting to a search of its data folders, might also be reasonable. (*See, e.g.*, *United States v. Wurie* (D. Mass. 2009) 612 F. Supp. 2d 104, 106-107 [when arrestee's mobile phone rang, officer flipped it open and observed originating number and "wallpaper" photograph, which led to discovery of arrestee's residence address].) And where the arresting officers have reason to fear imminent loss of evidence from the device, or some other exigency makes immediate retrieval of information advisable, warrantless examination and search of the device would be justified. (*See, e.g.*, *United States v. Lottie* (N.D. Ind., Jan. 14, 2008, No. 3:07cr51RM) 2008 U.S. Dist. Lexis 2864, *9 [officers had reason to believe that accomplices in large drug transaction, "unknown but potentially present and armed," were conducting countersurveillance of the police operation, raising concern for safety of officers and the public].)

The majority's holding, however, goes much further, apparently allowing police carte blanche, with no showing of exigency, to rummage at leisure through the wealth of personal and business information that can be carried on a mobile phone or handheld computer merely because the device was taken from an arrestee's person. The majority thus sanctions a highly intrusive and unjustified type of search, one meeting neither the warrant requirement nor the reasonableness requirement of the Fourth Amendment to the United States Constitution. As a commentator has noted, "[i]f courts adopted this rule, it would subject anyone who is the subject of a custodial arrest, even for a traffic violation, to a preapproved foray into a virtual warehouse of their most intimate communications and photographs without probable cause." (Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, *supra*, 50 Santa Clara L. Rev. at p. 211.) United States Supreme Court authority does not compel this overly permissive rule, and I cannot agree to its adoption.

WERDEGAR, J.

I CONCUR:

MORENO, J.